Citation: *R. v. Corporal M.A. Wilcox,* 2009 CM 2014

Docket: 200849

GENERAL COURT MARTIAL
CANADA
NOVA SCOTIA
VICTORIA PARK, SYDNEY

Date: 30 September 2009

PRESIDING: COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN
v.
CORPORAL M.A. WILCOX
(Offender)

SENTENCE
(Rendered orally)

INTRODUCTION

[1] Corporal Wilcox, upon the findings of this General Court Martial you have been found guilty of two offences; a charge of criminal negligence causing death in charge No. 2 in the charge sheet, and a charge of negligent performance of a military duty in charge No. 3.

[2] It now falls to me to determine and to pass a sentence upon you. In so doing, I have considered the principles of sentencing that apply in the ordinary courts of criminal jurisdiction in Canada and at courts martial. I have, as well, considered the facts of the case from the evidence heard at trial, the evidence heard and the materials submitted during the course of this sentencing hearing, as well as the submissions of counsel, both for the prosecution and for the defence.

[3] The principles of sentencing guide the court in the exercise of its discretion in determining a fit and proper sentence in an individual case. The sentence should be broadly commensurate with the gravity of the offence and the blameworthiness or degree of responsibility and character of the offender. The court is guided by the sentences imposed by other courts in previous similar cases, not out of a slavish

adherence to precedent, but because it appeals to our common sense of justice that like cases should be treated in similar ways. Nevertheless, in imposing sentence the court takes account of the many factors that distinguish the particular case it is dealing with, both the aggravating circumstances that may call for a more severe punishment and the mitigating circumstances that may reduce a sentence.

[4] The goals and objectives of sentencing have been expressed in different ways in many previous cases. Generally, they relate to the protection of society, which includes, of course, the Canadian Forces, by fostering and maintaining a just, a peaceful, a safe, and a law-abiding community. Importantly, in the context of the Canadian Forces, these objectives include the maintenance of discipline, that habit of obedience which is so necessary to the effectiveness of an armed force. The goals and objectives also include deterrence of the individual so that the conduct of the offender is not repeated, and general deterrence so that others will not be led to follow the example of the offender. Other goals include the rehabilitation of the offender, the promotion of a sense of responsibility in the offender, and the denunciation of unlawful behaviour.

[5] One or more of these objectives will inevitably predominate in crafting a fit and just sentence in an individual case, yet it should not be lost sight of that each of these goals calls for the attention of the sentencing court, and a fit and just sentence should reflect a wise blending of these goals tailored to the particular circumstances of the case.

[6] S. 139 of the *National Defence Act* prescribes the possible punishments that may be imposed at court martial. Those possible punishments are limited by the provision of the law which creates the offence and provides for a maximum punishment. Only one sentence is imposed upon an offender whether the offender is found guilty of one or more different offences, but the sentence may consist of more than one punishment. It is an important principle that the court should impose the least severe punishment that will maintain discipline.

[7] In arriving at the sentence in this case, I have considered the direct and indirect consequences for the offender of the findings of guilt and the sentence I am about to pronounce, including the circumstances under which a sentence of incarceration would be served.

[8] The prosecution seeks a sentence of six years' imprisonment, dismissal from the Canadian Forces, and reduction in rank to the rank of private. The prosecution seeks an order under s. 220 of the *NDA* that nine months of the sentence be served at the service prison and detention barracks. The prosecution also seeks a weapons prohibition order under s. 147.1 of the *National Defence Act* for a period of ten years, and a lifetime prohibition with respect to prohibited weapons, and finally the prosecution seeks an order under s. 196.14 that the offender provide DNA samples.

[9] Counsel for the offender submits that a sentence of 12 months' imprisonment to be served at the service prison and detention barracks is appropriate, but argues that the carrying into effect of the punishment of imprisonment should be suspended. The defence submits that reduction in rank to private is appropriate but that dismissal is not, and is opposed to the making of weapons prohibition and DNA orders.

[10] The offender and the deceased, Corporal Kevin Megeney, were both members of the Reserve Force belonging to militia units in Nova Scotia. In December of 2006 they deployed to Afghanistan as part of a rotation, and were members of the same section of their platoon. They trained together for some months during the work-up for the deployment, and by all accounts were close friends. In March of 2007 their duties were to guard the main gate, known as Entry Control Point (ECP) 3 at Kandahar Airfield, a large base for multi-national armed forces acting under NATO authority. It is clear from the evidence that the performance of these duties was physically and mentally demanding for the soldiers. Any one of the many hundreds of persons entering or leaving the base in a day might constitute a lethal threat to Canadian or allied forces, and the soldiers on guard duty at the gate were part of the first line of defence against any armed attack upon the base. In the course of their duties on the gate the members were personally armed with C7 rifles and Browning 9-millimetre pistols. Their weapons were loaded when on duty at the gate. When off duty, away from the gate, the members were required to comply with orders governing all persons on the base that they be armed at all times, but that their weapons be in an unloaded state with ammunition readily available.

[11] On 6 March 2007, at the end of their shift on the gate, the offender and Corporal Megeney were transported back to the tent accommodation on the base that they shared with other members of the section. The tent was partitioned into two halves, and the offender and Corporal Megeney occupied one side together with a senior member of the platoon. Shortly after the two of them entered their side of the tent the offender's pistol discharged killing Corporal Megeney.

[12] All these facts appear to be beyond dispute, but two very different versions of how the shot came to be fired emerged in the course of the evidence. The prosecution argued that the offender neglected to unload his pistol at the end of the shift at the gate, and once back at the tent the offender and Corporal Megeney were engaged in horseplay with their 9-millimetre pistols trying to see who was the faster of the two to draw and train their weapon on the other—a game that was referred to as "quick-draw." The defence argued, based upon the sworn evidence of the offender, that he knew he had not cleared his pistol upon leaving the gate, and when he returned to the tent he was stowing equipment when he heard the sound of a pistol being cocked behind him, and when he turned he saw a pistol pointed at him, perceived this as an imminent threat, and reacted by drawing his own pistol from his leg holster and firing in self-defence at the pistol.

Immediately after firing the shot he realized the pistol was held by his friend, Corporal Megeney.

[13] In a case such as this one where the findings of guilty are made by the panel of a General Court Martial, the trial judge, whose responsibility it is to arrive at a fit sentence, does not have the benefit of explicit findings of fact upon which the finding or verdict of the panel rests. Like a jury in any criminal case, the panel does not give reasons for its findings, nor does it make special findings on discrete factual issues. On what factual basis, therefore, is the court to arrive at a proper sentence?

[14] In *R. v. Ferguson*[1] the Supreme Court of Canada addressed this question:

> Two principles govern the sentencing judge in this endeavour. First, the sentencing judge "is bound by the express and implied factual implications of the jury's verdict" .... The sentencing judge "shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" ... and must not accept as fact any evidence consistent only with a verdict rejected by the jury ...
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> [18] Second, when the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts .... In so doing, the sentencing judge "may find any other relevant fact that was disclosed by evidence at the trial to be proven" .... To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities .... It follows from the purpose of the exercise that the sentencing judge should find only those facts necessary to permit the proper sentence to be imposed in the case at hand. The judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues.

[See also *R. v. Cooney (1995) 98 C.C.C. (3d) 196 (Ont. C.A.)]*

[15] The issue here is what is a fit and appropriate sentence?

[16] In my view, the findings of the panel in the present case are consistent with the view that the offender and the deceased were engaged in a consensual game of quick-draw, and are also consistent with the view that the offender intentionally fired the fatal shot, but that for one or more reasons the defence of self-defence was nonetheless rejected. It is not part of the sentencing judge's function to speculate as to how the panel reached its conclusions. That was one of the errors committed by the sentencing judge in *Ferguson*:[2]

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[1] [2008] 1 S.C.R. 96 at paragraph 17

[2] *Ibid*, see paragraph 22

> [22] First, the trial judge erred in attempting to reconstruct the logical reasoning of the jury. The law holds that the trial judge must not do this, and for good reason. Jurors may arrive at a unanimous verdict for different reasons and on different theories of the case .... It is speculative and artificial to attribute a single set of factual findings to the jury, unless it is clear that the jury must unanimously have found those facts. Where any ambiguity on this exists, the trial judge should consider the evidence and make his or her own findings of fact consistent with the evidence and the jury's findings.

[17] In my view, the findings of the panel in this case are ambiguous as to the facts, and as this passage makes clear it is my duty for sentencing purposes to make findings of fact based upon all the evidence led before the panel. As the court noted in *Ferguson*:[3]

> ... The trial judge should have considered all the evidence in order to make his own findings of fact consistent with the jury's verdict to the extent they were relevant to the two issues before him.

[18] On all the evidence, I am satisfied beyond a reasonable doubt that the shot that killed Corporal Megeney was accidentally discharged in the course of horseplay with guns engaged in by both the offender and the deceased. This was the version of the facts that the offender gave in the course of statements he made to his fellow soldiers both shortly after and again some months following the shooting when he admitted, among other things, to failing to unload his pistol at the gate. I accept the evidence of those witnesses who testified as to statements made to them by the offender, and I accept that they accurately reported the statements and utterances made by the offender.

[19] As well, I find that the offender told the truth to his fellow soldiers in the course of these statements. There was no reason for the deceased to train his pistol on the offender in the tent, as the accused himself testified he did, unless as part of the game of quick-draw. These findings of fact are consistent with the findings of the panel on each of the three charges.

[20] I should add that I do not consider that the version of the facts given by the offender in the course of his evidence is any less blameworthy or deserving of punishment than the facts as I have found them. The intentional firing of a pistol known to be loaded, in the direction of an unknown and unverified target, with the intention to kill, in the immediate vicinity of several other soldiers any of whom might have been struck by the shot, by someone trained to a high standard in the use and the capabilities of the weapon, and in circumstances where self-defence does not apply, must be considered for sentencing purposes to be at least as grave a set of circumstances as the accidental discharge of a loaded weapon occurring in the course of horseplay.

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[3] Supra note 1, see paragraph 23

[21] S. 130 of the *National Defence Act* makes offences contrary to federal enactments, including the *Criminal Code*, into service offences for the purpose of the Code of Service Discipline contained in the *National Defence Act*. Subsection 130(2) provides for the punishment of these offences as follows:

> (2) Subject to subsection (3), where a service tribunal convicts a person under subsection (1), the service tribunal shall,
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> (*a*) if the conviction was in respect of an offence
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> (i) committed in Canada under Part VII, the *Criminal Code* or any other Act of Parliament and for which a minimum punishment is prescribed, or
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> (ii) committed outside Canada under s. 235 of the *Criminal Code*,
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> impose a punishment in accordance with the enactment prescribing the minimum punishment for the offence; or
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> (*b*) in any other case,
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> (i) impose the punishment prescribed for the offence by Part VII, the *Criminal Code* or that other Act, or
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> (ii) impose dismissal with disgrace from Her Majesty's service or less punishment.

In the present case it is clear that the sentence of this court is to be imposed under subsection 130(2)(*b*) because clause (*a*) does not apply as the offence of criminal negligence was committed outside Canada.

[22] In my view, the intention of Parliament in enacting subsection 130(2) was to put military offenders against the ordinary criminal law on the same footing as their civilian counterparts for sentencing purposes.

The *Criminal Code* provides for the punishment of the offence of criminal negligence causing death at s. 220:

> Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable
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> (*a*) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
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> (*b*)in any other case, to imprisonment for life.

[23] The defence submits that the mandatory minimum punishment prescribed by the *Criminal Code* does not apply in this present case because minimum punishments are to be imposed when the court is exercising its sentencing authority under clause (*a*) as opposed to clause (*b*) of subsection 130(2). I have considerable doubt that this proposition accurately states the law, but in the circumstances of this case I find I do not have to resolve this issue.

[24] Among the principles of sentencing that the court should consider I have already adverted to the principle of parity. This principle is reflected in s. 718.2(*b*) of the *Criminal Code* which provides:

> A court that imposes a sentence shall also take into consideration the following principles:
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> …
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> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances[4]

[25] It is clear that if the offence of criminal negligence causing death with a firearm were committed by a civilian in the present case, the offender would be sentenced to the minimum punishment prescribed by the *Criminal Code* of four years' imprisonment. It is also clear that had the offence in this case been committed by a military member in Canada, rather than in Afghanistan, perhaps, for example, in the course of pre-deployment training for the Afghan mission, the offender would also be sentenced under subsection 130(2)(*a*) to the minimum penalty of four years' imprisonment.

[26] In this case I am unable to say how the offender's crime can be considered any less grave for sentencing purposes because it was committed overseas in a theatre of war operations by someone who has had the benefit of extensive military training in proper weapons handling.

[27] The prosecution has referred to the objective gravity of the offence as reflected in the maximum punishment that can be imposed for the offence of criminal negligence causing death. I consider that the statutory minimum punishment for this offence of four years' imprisonment is a further indication of the gravity with which a sentencing court is to view the killing of another person by means of a firearm.

[28] The conduct of the offender that resulted in the death of Corporal Megeney was part of a pattern of negligent behaviour that began with the offender's failure to unload his firearm at the gate at the end of the workday. The offender violated the trust of his

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[4] See also *R. v. Lui*, CMAC-482, decided March 8, 2005.

colleagues who, as a team, faced dangers that many of us can only imagine, but who were entitled to expect that the threat to their safety and well-being would not come from one of their fellow soldiers.

[29] The offender is a young single man, and an excellent soldier. He is active in the community in addition to his service in the Reserve Force where he is described by his officers as consistently rated in the top one-third of the corporals. He has taken and is taking steps to further his education. I have no doubt that he himself has suffered enormously from the loss of his good friend and platoon-mate, and yet he has performed his military duties since the date of the offences in a conscientious and professional manner. He has no record of previous disciplinary infractions.

[30] I wish to say a word to the family members of both the offender and of Corporal Megeney, some of whom testified in the course of these proceedings. I am aware that all of you, and no doubt many others who did not testify, have suffered enormous grief as a consequence of these offences. I know that you know that no sentence of this court can begin to restore to you what you have lost in different but nonetheless all tragic ways. In arriving at a sentence I am required to give much more weight to other matters, but I did pay close attention to your evidence, and I thank you for the courage you all displayed in giving your evidence.

[31] In my view, taking into consideration all the circumstances of the offences and of the offender, a fit sentence in this case is one of four years' imprisonment and dismissal from Her Majesty’s service.

[32] Under s. 215 of the *National Defence Act* the court has the authority to suspend the carrying into effect of the punishment of imprisonment. I am asked by the defence to exercise this authority considering all the circumstances of the offender, including the fact that he is currently registered in a program of post-secondary education. I am not persuaded that this is a proper case in which to suspend the execution of the sentence.

[33] Under s. 220 of the *National Defence Act*, the sentence of imprisonment will be served in a federal penitentiary, but under subsection 220(1) the court, as a committing authority, may order that the sentence, or any part of it, be served at the service prison in Edmonton. The prosecution suggests that the first nine months of the sentence should be ordered to be served at the service prison. I invited the defence to address this issue specifically, and after consideration the defence has made no application to have all or any part of the sentence served at the service prison. In the circumstances I decline to make an order as to where the sentence will be served.

[34] I have decided that dismissal from Her Majesty’s service is also an appropriate punishment in this case. It is true that I have heard evidence from the offender’s commanding officer, and others from his unit, that they would support the continuation

of the offender's military career once the sentence of this court is served. I understand why the offender has the support of his unit. He is a capable and dedicated soldier with many qualities that would benefit the Canadian Forces. On the other hand, as a soldier he was highly trained in the proper use of dangerous firearms, and on the occasion of these offences he wilfully ignored the instructions he had received in the course of that training. That his criminal carelessness should have had such tragic consequences for the victim and his family, for his own family, and for other members of the platoon and his unit, and even had potential repercussions for the mission for which he was deployed, is very much to be regretted. These factors, to my mind, outweigh in importance the positive attributes of the offender and justify his dismissal.

[35] I do not consider reduction in rank to be appropriate in this case.

[36] I consider that this is a proper case for both a DNA order and a weapons prohibition order. With respect to the weapons prohibition order, there will be a five-year prohibition on all weapons, and as the offender is dismissed the service the order will apply to prohibit the possession of anything in the course of duties as a member of the Canadian Forces.

[37] With respect to the DNA order, the offender has been found guilty of a secondary designated offence as defined and I consider it to be in the best interests of the administration of military justice that the order be made.

[38] Corporal Wilcox, you are sentenced to imprisonment for a period of 48 months and to dismissal from Her Majesty's service.

Commander P.J. Lamont, M.J.

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