COURT MARTIAL

Citation: *R v Larouche*, 2012 CM 3023

Date: 20121219
Docket: 201164

Standing Court Martial

Saint-Jean Garrison
Saint-Jean-sur-Richelieu, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Private R. Larouche, Offender

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

Restriction on publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the persons described in this judgement as the complainants or witnesses shall not be published in any document or broadcast or transmitted in any way.

OFFICIAL ENGLISH TRANSLATION

REASONS FOR SENTENCE

(Orally)

[1] On 30 August 2012, this Standing Court Martial found Private Larouche guilty, under section 130 of the *National Defence Act*, of the offence of voyeurism contrary to subsection 162(5) of the *Criminal Code* and the offence of possession of child pornography contrary to subsection 163.1(4) of the *Criminal Code*.

[2] It now falls to me, as the military judge presiding at this Standing Court Martial, to determine the sentence.

[3] In the special 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 more positive terms, to promote good conduct. It is through discipline that an armed force ensures that its members perform their missions successfully, confidently and reliably. The military justice system also ensures that public order is maintained and that persons charged under the *Code of Service Discipline* are punished in the same way as any other person living in Canada.

[4] Sentencing is one of the most difficult tasks for a judge. In *R v Généreux*, [1992] 1 SCR 259, at page 293, the Supreme Court of Canada held that, "[t]o maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently". It also emphasized that, in the particular context of military justice, "[b]reaches 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 a case. In other words, any sentence imposed by a court, be it civilian or military, 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.

[5] In the case at bar, a minimum punishment of imprisonment for a term of 45 days is provided for one of the two offences, and counsel for the prosecution has suggested that I sentence Private Larouche to 18 months' imprisonment. Counsel for the defence, who is representing the offender, has recommended a sentence of six months' imprisonment.

[6] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and the maintenance of discipline by imposing punishments 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 the offender.

[7] When imposing sentences, a military court may 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 degree of responsibility and previous character of the offender.

c. The sentence must be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

d. Before depriving an offender of his or her freedom, the Court must consider whether less restrictive sanctions are appropriate in the circumstances. In short, the Court should impose a sentence of imprisonment or detention only as a last resort; and

e. Last, all sentences should be adapted to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[8] The Court is of the opinion that sentencing in this case should focus on the objectives of, first, denunciation of unlawful conduct and, second, 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 others in similar situations from engaging in the same prohibited conduct.

[9] Regarding the offence of voyeurism, it appears that V.C. had a romantic relationship with the offender from October to December 2009, during which the offender filmed her, without her knowledge, while she was sleeping in a bed in the bedroom of Private Larouche's apartment with her course notes beside her: at the time, she was half-naked and wearing nothing but jeans.

[10] Regarding the offence of possession of child pornography, the offender has admitted that he possessed 1054 electronic files containing child pornography, as defined at subsection 163.1(1) of the *Criminal Code*. Of that number, 553 files were original files, and 501 files were copies of original files.

[11] Of the 553 original files, also known as single files, 210 had not been copied. Of the 343 original files that were copied, 297 are photos and 46, video files.

[12] The child pornography files in the offender's possession contain photos and videos of two teenage girls. In fact, the vast majority of the photo files, which the offender himself made, show his stepdaughter, who was aged between 13 and 18 at the time, nude in various positions, something he occasionally paid her for; there are also photo and video files on which she can be seen performing sexual acts with the offender.

[13] The offender also possessed photo and video files of another 14-year-old teenage girl in the nude, which he too had made.

[14] On January 21, 2010, after obtaining a search warrant, the military police searched Private Larouche's home and seized these photo and video files, arresting Private Larouche at the same time. The offender was released with conditions. In spite of the condition not to communicate with his alleged victims, he attempted to contact one of the victims on at least two occasions.

[15] In the Quebec Court of Appeal's decision in *R v. L. (J.J.)*, 1998 CANLII 12722 (Qc C.A.), at pages 4 to 7, Justice Otis, writing for the Court, set out the factors qualifying the criminal responsibility of an offender when passing sentence for sexual offences, as follows:

> [TRANSLATION]
> a. The nature and intrinsic gravity of the offences, which may involve, among other things, the use of threats, violence, or manipulation.
>
> b. The frequency of the offences and the time period over which they occurred.
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> c. The abuse of the relationship of trust and authority between the offender and the victim.
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> d. The disorders underlying the commission of the offences: the offender's psychological distress, pathologies and deviance, intoxication.
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> e. The offender's prior convictions, their proximity in time to the alleged offence and the nature of prior convictions.
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> f. The offender's conduct before and after the offences were committed: confessions, co-operation with the investigation, immediate enrolment in a treatment program, rehabilitation potential, financial assistance where appropriate, compassion and empathy for the victims (remorse, regret, etc.).
>
> g. The time between the commission of the offence and the conviction as a mitigating factor, depending on the conduct of the offender (offender's age, social and occupational integration, commission of other offences).
>
> h. The victim: gravity of the attack on his or her physical and psychological integrity, which may involve, among other things, age, the nature and magnitude of the assault, the frequency and duration, the victim's characteristics and vulnerability (mental or physical disabilities), abuse of trust or authority, lasting trauma.

[16] Clearly, there are other factors that are not mentioned in that decision, such as whether or not the offence was premeditated, whether drugs or alcohol were involved and how much time passed before charges were laid. Any other factors may also be considered, as this list is not exhaustive.

[17] In arriving at what it considers to be a fair and appropriate sentence, the Court has therefore considered the aggravating and mitigating factors presented by the facts of this case.

[18] The Court finds the following factors to be aggravating:

a. The objective seriousness of the offences. You have been found guilty of two service offences under section 130 of the *National Defence Act*, namely voyeurism contrary to subsection 162(5) of the *Criminal Code*, which is liable to imprisonment for a term not exceeding five years or a lesser sentence, and possession of child pornography contrary to subsection 163.1(4) of the *Criminal Code*, which is liable to imprisonment for a term not exceeding five years or a lesser sentence and to a minimum punishment of imprisonment for a term of forty-five days.

b. Regarding the objective seriousness of the offence of possession of child pornography, I would like to draw attention to the comments made by the Quebec Court of Appeal on this subject in *R c Von Gunten*, 2006 QCCA 286, at paragraphs 13 to 15:

> [TRANSLATION]
> I will summarily examine each of the grounds raised by the prosecutor, starting with the objective seriousness of the crime in question. The Supreme Court of Canada discussed this issue in *Sharpe*:
>
> > The links between possession of child pornography and harm to children are arguably more attenuated than are the links between the manufacture and distribution of child pornography and harm to children. However, possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children. Possession of child pornography may facilitate the seduction and grooming of victims and may break down inhibitions or incite potential offences.
>
> There is no question that the crime of possession is a serious one. Care must be taken, however, not to confuse this crime with the crimes of production and distribution, which are much closer to the harm that Parliament wishes to eradicate, namely the shameless exploitation of children.
> Similarly, one cannot ignore that Parliament has placed this crime in the same category as those that are not liable to a higher sentence than five years' imprisonment. It therefore falls into one of the least serious categories of the categories comprising crimes punishable by indictment. Objectively, therefore, according to Parliament, possession is a less serious crime than the theft of property worth over $5,000.

Regarding the subjective seriousness of the offences, I have gleaned four aspects from the evidence presented to me:

i. Regarding the offence of voyeurism, you abused the trust of your victim, your lover at the time, in your own home. She clearly had a problem with your posing and filming her naked and you decided to do so secretly to obtain what you wanted.

ii. Moreover, the victim's later discovery of such film footage shocked her and undermined her physical and psychological integrity.

iii. The nature of the child pornography must be considered to be an aggravating factor in this case. What was seized was not child pornography that you downloaded from sites, but rather that you kept and which involved

1. Two minor female victims who were barely teenagers.

2. One of these victims being your stepdaughter whom you occasionally paid and who, in principle, is someone who is close to you;

3. Photographs and videos of the two victims in the nude and of your stepdaughter performing sexual acts;

4. Sexual acts in which you personally participated and which you filmed and photographed;

5. Material covering different times of your stepdaughter's adolescence, a period of about four years;

iv. The number of photo and video files that were seized. This means that this was not a momentary act, but that you had developed somewhat of a habit to keep such things for your own ends.

[19] The Court considers the following to be mitigating factors:

a. Your confessions regarding your commission of the offence of possession of child pornography, showing that you accept some responsibility and meaning that the victims did not have to testify;

b. Your lack of a criminal record or conduct sheet referring to similar offences;

c. The fact that your military career ended quickly as a result of these incidents, to the extent that you were relieved of your duties and your career was subject to an administrative review, which led to your release in April 2011 on

> ground 2(*a*) for unsatisfactory service, is a mitigating factor that must be considered even though it is not, in itself, a disciplinary sentence. In fact, the termination of your service as a Canadian Forces officer is a purely administrative process that is guided by different legal parameters than those of the disciplinary system, but which the Court must take into account because of the facts related to and the indirect consequences resulting from that termination;
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> d. The fact that you had to face this Court Martial, which was announced to and accessible to the public and which took place in the presence of some of your colleagues and peers and the media, has no doubt had a very significant deterrent effect on you and on them. The message is that the kind of conduct that you engaged in will not be tolerated in any way and will be dealt with accordingly.

[20] I must bear in mind that section 163.1 of the *Criminal Code*, as it was in effect when the offence was committed, requires courts to impose a minimum punishment of imprisonment for a term of 45 days.

[21] The Court must therefore impose the punishment of imprisonment on the offender because it is required in accordance with the effects of the combination of paragraph 130(2)(*a*) of the *National Defence Act*, which provides for the imposition of the minimum punishment prescribed in the applicable provision of the *Criminal Code*, and section 163.1 of the *Criminal Code*, which provides for the mandatory imposition of a minimum punishment of imprisonment for a term of 45 days.

[22] The question now is what the duration of such a sentence of imprisonment should be to ensure the respect of the law and to maintain discipline.

[23] It is important to emphasize that the Court is of the opinion that when the acts as charged go beyond the scope of discipline and are criminal in the true sense, the military judge who imposes the sentence must examine the offences not only in light of the values and skills of members of the Canadian Forces, but also from the perspective of the exercise of concurrent criminal jurisdiction.

[24] In consideration of the principle of parity in sentencing, therefore, a review of the case law submitted by the parties, which covers the recent period of 2006 to 2012, and which contains decisions analyzing various sentencing decisions relating to the possession of child pornography, also including other offences such as voyeurism, suggests that the terms of imprisonment imposed range from almost the minimum punishment to at least two years less a day. However, without this being a formal reference, in similar circumstances, the Canadian courts seem to impose a sentence ranging from 6 to 18 months' imprisonment, the majority of sentences being in the 9 to 12 months range.

[25] As Justice Parent so beautifully phrased it in *R c É C* at paragraph 70:

> [TRANSLATION]
> As the Supreme Court wrote in *Sharpe*, child pornography entails exploiting children, and the possession of child pornography has no social value.

[26] In the case at bar, the particular nature of the child pornography possessed by the offender is a special aggravating factor that the Court must consider. In making videos and photographs that he kept on his computer, Private Larouche contributed to the exploitation of two young girls for no good reason, and in the case of one of them, for a significant length of time.

[27] In addition, the offence of voyeurism merely re-emphasizes that the offender's primary purpose was to satisfy his own sexual desires with no regard for the physical and psychological integrity of a person who trusted him.

[28] V.C.'s testimony regarding Private Larouche's habit to show her nude photographs of other women he knew and to take pictures of her in the shower, his misrepresentations about his actual position in the Canadian Forces and his manipulation of her are worrying factors that, in combination with those surrounding the commission of the offences, weigh in favour of a severe sentence.

[29] I cannot ignore that the Court does not have a profile of the accused, be it in regard to his attitude about the commission of the offences or his psychological profile. This clearly makes it harder to come up with a fair, appropriate sentence in the circumstances. The Court is able to deduce that Private Larouche has a propensity to photograph and film women in the nude and certain sexual acts, a habit he seems to be quite open about. Indeed, he seems to collect such material. Moreover, he seems to have a habit of wanting to involve people who are close to him, regardless of how old they are.

[30] He clearly has a behavioural problem, and the absence of information in that regard, particularly as to its extent, his likelihood to reoffend and, above all, how he intends to solve his problem, without necessarily weighing in favour of a longer term of imprisonment, does not support the consideration of a shorter one.

[31] After having reviewed the case law, taken into account the principles and objectives applicable to sentencing, including those related to denunciation and deterrence, and considered the aggravating and mitigating factors, I find that a punishment of imprisonment for a term of 12 months would be appropriate and just in the circumstances.

[32] In accordance with section 196.14 of the *National Defence Act*, considering that both offences for which I have passed sentence are primary designated offences 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 Private Larouche for the purpose of forensic DNA analysis.

[33] In accordance with section 227.01 of the *National Defence Act*, and considering that both offences of which I have found the offender guilty are designated offences within the meaning of section 227 of the *National Defence Act*, I order you, as appears from the attached regulation form, to comply with the *Sex Offender Information Registration Act* for life in accordance with subsection 227.02 (2.1) of the *National Defence Act*.

[34] 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 to protect the safety of the offender or any other person in the circumstances of this case.

[35] The prosecution has asked the Court to issue an order to confiscate the items that were seized at the offender's, particularly the child pornography material. It has suggested the Court could apply section 249.25 of the *National Defence Act* for this purpose. This provision reads as follows:

> **249.25** (1) Where a person is convicted of an offence under the Code of Service Discipline, the service tribunal shall order that any property obtained by the commission of the offence shall be restored to the person apparently entitled to it if, at the time of the trial, the property is before the service tribunal or has been detained so that it can be immediately restored under the order to the person so entitled.
> (2) Where an accused person is tried for an offence but is not convicted and it appears to the service tribunal that an offence has been committed, the service tribunal may order that any property obtained by the commission of the offence shall be restored to the person apparently entitled to it if, at the time of the trial, the property is before the service tribunal or has been detained so that it can be immediately restored under the order to the person so entitled.
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> (3) An order shall not be made in respect of
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> > (*a*) property to which an innocent purchaser for value has acquired lawful title;
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> > (*b*) a valuable security that has been paid or discharged in good faith by a person who was liable to pay or discharge it; or
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> > (*c*) a negotiable instrument that has, in good faith, been taken or received by transfer or delivery for valuable consideration by a person who had no notice and no reasonable cause to suspect that an offence had been committed.
>
> (4) An order made under this section shall be executed by the persons by whom the process of the service tribunal is ordinarily executed.

[36] In my opinion, the wording of section 249.25 of the *National Defence Act* does not allow this Court to issue an order of forfeiture. In fact, the purpose of this provision

is to return property that has been used to commit an offence to its owner and not for property to be forfeited by virtue of its nature so that it is permanently removed from its owner.

[37] I also analyzed the possibility that this Court issue an order of forfeiture for the property that was used in the commission of the offence of possession of child pornography under section 164.2 of the *Criminal Code*, as suggested by the prosecution.

[38] It is important to note from the outset that, in the *National Defence Act*, Parliament has provided for certain orders that a court may issue, such as the restitution of some property under section 249.25 or the prohibition to possess a weapon under section 147.1 These orders are specifically provided for in the *National Defence Act*, but there is no provision for an order of forfeiture.

[39] It is clear for this Court that it cannot exercise such a prerogative by simply relying on this provision of the *Criminal Code*.

[40] The prosecution has suggested that the wording of section 179 of the *National Defence Act* allows the Court Martial to issue such an order. This provision reads as follows:

> **179.** (1) A court martial has the same powers, rights and privileges as are vested in a superior court of criminal jurisdiction with respect to
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> (*a*) the attendance, swearing and examination of witnesses;
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> (*b*) the production and inspection of documents;
>
> (*c*) the enforcement of its orders; and
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> (*d*) all other matters necessary or proper for the due exercise of its jurisdiction, including the power to punish for contempt.
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> (2) Subsection (1) applies to a military judge performing a judicial duty under this Act other than presiding at a court martial.

[41] It is my view that, given that the child pornography offence is within the jurisdiction of the Court Martial in this case, this Court being able to issue an order that arises directly from the sentencing of that same offence goes without saying. In fact, if this Court has the authority to dispose of the offence, it also has the authority to pass sentence and to issue any orders related to the sentencing of this offence, just like a superior court of criminal jurisdiction would have the authority to do.

[42] I therefore conclude that this Court has the authority to issue an order under section 164.2 of the *Criminal Code*, and, consequently, I order that the property used in the commission of the offence of child pornography, that is, the property bearing

numbers 0935656B-14 and 0935656B-15 under Exhibit 13, be forfeited to Her Majesty and disposed of as the Director of Military Prosecutions directs.

[43] It is also my duty to say that, in the present circumstances and as a result of my conclusion regarding the enforcement and scope of section 179 of the *National Defence Act*, I believe that this Court Martial is authorized to issue, under section 161 of the *Criminal Code*, an order prohibiting the offender from being in contact with or in the presence of a person under the age of 16 in certain places.

[44] In fact, given the offender's behavioural problems, as revealed by the evidence, and considering the nature of the child pornography in his possession, and in the absence of any information on the nature or scope of the behavioural problems, the offender's likelihood to reoffend and the way in which he seeks to solve his behavioural problems, I conclude that, it is in the interest of public safety, that such an order be issued.

[45] Consequently, the Court prohibits the offender from attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre; seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years; having any contact — including communicating by any means — with a person who is under the age of 16 years, unless the offender does so under the supervision of an adult.

[46] I can but regret that the Court Martial does not have the authority to ask a probation officer to make a written report relating to the accused for the purpose of assisting the court in imposing a sentence, as provided by section 721 of the *Criminal Code*. In the current system, the Court relies solely on the offender's willingness to submit to the exercise requiring such a report, and it is not in the position to oblige the offender to do so or to criticize him for not doing so.

[47] The lack of such a tool limits the evidence that can be obtained to assist the military judge in determining a fair and appropriate sentence, particularly in the exercise of concurrent criminal jurisdiction.

[48] In this context, and in the knowledge that the prosecution found that the Court could not issue an order under section 161 of the *Criminal Code*, and that this Court's authority to issue other orders is not clearly defined in the *National Defence Act*, the prosecution's decision to bring its charges before the Court Martial instead of a civilian court of criminal jurisdiction raises several issues. Considering the particular context of this case, it is appropriate for this Court to raise the issue, namely, whether the interests of justice and the public would not have been better served before a court with the full and clear jurisdiction to deal with such an offence.

[49] Choosing the appropriate forum comes within the prosecution's discretion, and the Court does not intend to challenge this choice here. However, in light of the case and the facts that have been brought before this Court Martial, the Court may raise the issue that public interest seems not, on its face, to have been best served because of the tools this Court has been given by Parliament. I fervently hope that a discussion of this issue takes place.

[50] Private Larouche, please stand up.

FOR THESE REASONS, THE COURT:

[51] **SENTENCES** you to imprisonment for a term of 12 months.

[52] **ORDERS** the taking from you of the number of samples of bodily substances that is reasonably required for the purpose of forensic DNA analysis under section 196.14 of the *National Defence Act*.

[53] **ORDERS** you to comply with the *Sex Offender Information Registration Act* for life in accordance with subsection 227.02 (2.1) of the *National Defence Act*.

[54] **ORDERS** that, under section 179 of the *National Defence Act* and section 164.2 of the *Criminal Code*, the property used in the commission of the offence of child pornography, that is, the property bearing numbers 0935656B-14 and 0935656B-15 under Exhibit 13, be forfeited to Her Majesty and disposed of as the Director of Military Prosecutions directs.

[55] **PROHIBITS** you, under section 179 of the *National Defence Act* and section 161 of the *Criminal Code*, from attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre; seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years; having any contact — including communicating by any means — with a person who is under the age of 16 years, unless the offender does so under the supervision of an adult.

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