COURT MARTIAL

Citation: *R v Steward*, 2013 CM 3035

Date: 20131217
Docket: 201344

Standing Court Martial

LCol George Taylor Denison III Armoury
Toronto, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Sergeant J.G.W. Steward, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Sergeant Steward, having accepted and recorded a plea of guilty in respect of the second charge, the court finds you now guilty of this charge. Considering that the first charge was withdrawn by the prosecution, then the court has no other charges to deal with.

[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 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 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). 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 recommended to this court to impose a severe reprimand and a fine in the amount of $1,500 to $1,800 in order to meet the justice requirements. Sergeant Steward's defence counsel suggested that a severe reprimand would be sufficient in the circumstances and if the court would like to consider a fine in addition to that punishment, then an amount of $1,000 to $1,200 would appear as something more reasonable in the circumstances of this case.

[6] 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, and I quote again on the same page:

> … 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 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.

[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 judge 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 established by the Court Martial Appeal Court and in 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 circumstances of this case, sentencing should place the focus on the objectives of denunciation and general deterrence.

[10] Here in this case, the court is dealing with the military offence of neglect to the prejudice of good order and discipline for failing to properly secure a firearm contrary to the applicable policy. This type of offence goes at the heart of principal of ethics such as integrity and honesty. Giving precedence to some legal obligations involving the proper storage of a weapon in order to avoid any incident and being truthful in decisions and actions to avoid such a consequence is essential to the accomplishment and success of any mission within the Canadian Forces.

[11] In the context of the exercise Ready Watchdog at Canadian Forces Base Borden, Sergeant Steward, as a member of 2 MP Regiment was issued on 13 April 2012 a Sig Sauer P225 Pistol with a magazine full of ammunition and one loose round. He left Toronto for CFB Borden on that day without using a holster and having a magazine in hand.

[12] At his arrival at CFB Borden, Sergeant Steward had to attend an ammunition briefing where weapons were not permitted. He needed to leave his weapon and magazine under positive control of somebody but could not find anybody. Then, he put his

pistol, the magazine and the loose round in an ammunition can and left it in the CQ unbeknown to anyone. This location was guarded 24 hours daily.

[13] The ammunition can was located and its content identified and seized. Later, it was returned to Sergeant Steward. A disciplinary investigation was conducted. Sergeant Steward was met by the investigator and admitted some facts. The investigator interviewed Sergeant Steward four times, the two first times having failed to inform the latter of his constitutional right to counsel despite talking about his right to silence, and the fourth time having to do that because the signed form was inadvertently shredded further to the third interview.

[14] 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 section 129 of the *National Defence Act*, 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 there's two aspects to it:

i. first, your rank and extensive training and experience within the Canadian Forces, especially with weapons. I do not intend to elaborate on that matter because you know better than I do that you could have made a better decision at that time, considering your knowledge and experience. Sufficient to say that you had everything to make a better decision and you did not do it; and

ii. secondly, your lack of consideration for safety and security about weapons and ammunitions. Considering your responsibilities and your function at the time, expectations were very high coming from somebody who was the trained unit ammunition representative. You knew the importance and purpose of properly securing ammunitions and weapons and despite that knowledge, you decided to act as you did.

[15] There are also mitigating factors that I have considered:

a. first, there's your guilty plea to the charge. 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 valid asset to the Canadian society. It also disclosed the fact that you are taking full responsibility for what you did;

b. the fact that you had to face this court martial, which was announced and accessible to the public and which took place in your own unit in the presence of some of your peers has no doubt had a very significant deterrent effect on you and on them. It sends the message to others that the kind of conduct you displayed would not be tolerated in anyway and will be dealt with accordingly;

c. the absence of any annotation on your conduct sheet. There is no indication of the commission of any similar offence, military or criminal offence, in relation or not to what happened;

d. your overall career performance in the Canadian Forces. Clearly, you are dedicated to the Canadian Forces and the Veterans. You're very professional and the commendation you received clearly demonstrates your dedication to the Canadian Forces and the community; and

e. there's also the fact that it is an isolated and really out of character incident. The court is ready to accept that your PTSD condition may have played a role in the way you acted at the time of the incident and might have clouded your judgment to a certain extent. However, there is no evidence that such condition is the sole factor that could explain your actions, considering your extensive knowledge and experience. It is clear for the court that it is not the kind of conduct you have adopted throughout your career and the court recognizes that it was very unusual for somebody like you to do what you did.

f. also, this punishment, whatever it is, 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.

[16] On the issue raised by the defence counsel to modulate that punishment in the light of the application of the future section 249.27 of the *National Defence Act* that is not in force yet, the court would like to say that it has no intent to consider that section as a factor to set an appropriate punishment to be imposed to the offender. It is no law and may be or never be law. It is not the role of this court to make an interpretation of that section in such a context and it won't give it any consideration.

[17] Concerning the suggestion made by defence counsel to reduce sentence to be normally imposed in light of the conduct of the investigator about his failure to inform the offender of his constitutional right to counsel when he was interviewed the first two times and about interviewing a fourth time the offender because of investigator's failure to secure properly the evidence, such as the form signed on that matter by the offender, I would like to say that I do not see that as a factor to be considered by this court.

[18] As stated by judge Perron in his decision of *R v Hunter*, 2012 CM 4003, at paragraph 23:

> … The Supreme Court of Canada has held that state conduct not rising to the level of a *Charter* breach can be properly considered as a mitigating factor in sentencing. Where the state misconduct in question relates to the circumstances of the offence or the offender, a sentencing judge may properly take the relevant facts into account in crafting a fit sentence, without having to resort to section 24(1) of the *Charter* (see para 3 of *Nasogaluak*).

[19] I do agree with that statement made by Judge Peron, but I do not find in the evidence before this court something that would allow it to consider the investigator conduct regarding failure to inform the offender about his constitutional right to counsel as a mitigating factor. Obviously, the court does not have the full context in which such an alleged omission occurred. Also, it still unclear what would have been the impact on the offender of such a failure. Also, it is unclear that this alleged state misconduct is in relation to the circumstance of the offence. Without further details, it is very difficult for the court to really appreciate the very nature of such an alleged omission by the investigator and to fully appreciate its impact and consequence on the offender.

[20] Now, what would be a fit sentence in the circumstances of this case? As a matter of fact, both counsel suggested that a severe reprimand would be appropriate in the circumstances of this case.

[21] As expressed in the Concise Oxford Dictionary, a reprimand is "a formal expression of disapproval". It denounces offenders' actions and failure to behave with the integrity expected and required by reason of the rank or function.

[22] Considering the rank, experience, knowledge and function of Sergeant Steward at the time of the incident, I found that a reprimand in the circumstances of this case would reflect properly the objective of denunciation I am relying on. I do consider that it also constitutes the minimum necessary intervention that is adequate in the particular circumstances of this case for the application of this type of punishment.

[23] The prosecutor suggested to the court to impose a fine in combination with the reprimand. The defence counsel was of the view that it was unnecessary in the circumstances of this case, especially considering the mitigating factors.

[24] The accused told to the court that he did not see why such a sentence should be passed on him by the court because it would not punish only him but also his family. I would like to say on that issue that every sentence imposed on an offender has always some impact or collateral effects on those who are close to him. Unfortunately, because of his or her actions, it is an unavoidable consequence for some types of punishments imposed to an offender by the court and in some circumstances it may be considered or not by the court.

[25] As a matter of fact and from a penal perspective, very often, non respect of a policy or directive will often, but not always, result in the imposition of a fine. In the circumstances of this case, I do not see any reason to avoid imposing such a consequence on the offender.

[26] For this matter, considering the nature of the offence, the circumstances it was committed, the applicable sentencing principles, the aggravating and mitigating factors considered, I conclude that a combination of a reprimand and a fine would constitute the minimum necessary intervention that is adequate.

[27] I would disagree with the prosecution that because of occurring in an operational theatre, the cases of *R* v *Harris*, 2011 CM 4008, *R* v *Canuel*, 2012 CM 4014 and *R* v *McEwen*, 2013 CM 3011 do not appear as more serious as the case before this court. To the contrary, they appear as less serious considering the nature of the failure involve in those matters when compare to the circumstances of the case before this court. However, as setting the appropriate level of a fine, I found these cases as very relevant on that issue.

[28] From the court perspective, a fine to the amount of $1,000 would appear as a fit and appropriate amount in the circumstances of this case. It would also reflect the principle of general deterrence that the court is relying on.

FOR THESE REASONS, THE COURT:

[29] **FINDS** you guilty of the second charge on the charge sheet for an offence under section 129 of the *National Defence Act* for failing to properly secure a firearm contrary to the applicable policy.

[30] **SENTENCES** you to a reprimand and a fine in the amount of $1,000. The fine shall be paid in monthly instalments of $100 commencing on the 1st day of January, 2014. If you are released from the Canadian Forces before the fine is fully paid, then the entire outstanding amount shall become due and payable the day before the effective date of your release from the Canadian Forces.

Counsel:

Major T.E.K. Fitzgerald, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Lieutenant-Commander D. Liang, Directorate of Defence Counsel Services
Counsel for Sergeant J.G.W. Steward