COURT MARTIAL

Citation: *R v Wilks*, 2011 CM 4029

Date: 20111212
Docket: 201124

Standing Court Martial

Her Majesty Canadian Ship Prevost
London, Ontario, Canada

Between:

Her Majesty the Queen

- and -

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

Before: Lieutenant-Colonel J-G Perron, 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information that could disclose the identity of the persons described in this judgement as the complainants shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR SENTENCE

(Orally)

[1] Ex-Petty Officer 2nd Class Wilks, the court, at the conclusion of a complete trial, has found you guilty of one charge of sexual assault and of four charges of breach of trust by a public officer. The court must now impose a fit and just sentence.

[2] You were a Petty Officer 2nd Class employed as a medical technician at the time of the offences. You had to conduct enrolment medical examinations as part of your duties. You performed enrolment medical examinations on the three victims.

[3] During one examination, you told the applicant, Able Seaman E.C., to remove her clothing except for her panties. She was not provided with a gown or shorts. You left the examination room when she changed and then came back into the room. You

told her to perform different movements to examine her range of motion. You left the room while she put on her brassiere and then you returned to continue the examination.

[4] You told Miss A.D. to remove her clothing except for her brassiere and panties and to put on a gown when she underwent her enrolment medical examination on 4 November 2009. She was not expecting to have to remove her clothes and had worn a thong that day. She was not provided with shorts. You asked her to expose her left breast and you examined her left breast with your fingers. You then told her to expose her right breast and you examined her right breast. You pressed on her nipples with your fingers. You examined her breasts in that manner on 4 and 20 November 2009. On 20 November, you told her to only remove her blouse and brassiere and you told her to put on a gown. On 4 November 2009, while standing behind her, you told her to bend down so you would examine the curvature of her spine. Miss A.D. felt very uncomfortable in that position because she was only wearing a thong at the time.

[5] You told Miss Robi Williams to remove her clothing except for her brassiere and panties and to put on a gown when she underwent her enrolment medical examination. She was not provided with shorts. You used your fingertips to examine her breasts when she was still wearing her brassiere. You then told her to remove her brassiere. You told her to raise one breast and then the other. You then told her to raise her arms and her gown fell to her waist exposing her breasts. You did not touch her breasts after she had removed her brassiere.

[6] You were not authorized to conduct breast examinations as part of the enrolment medical examination. An applicant had to be dressed in a manner that would ensure the dignity and the privacy of the applicant were respected at all times. You had to ensure every female applicant wore her underwear, brassiere and panties, shorts and a gown or T-shirt.

[7] As indicated by the Court Martial Appeal Court sentencing is a fundamentally subjective and individualized process where the trial judge has the advantage of having seen and heard all of the witnesses and it is one of the most difficult tasks confronting a trial judge (see *R v Tupper,* 2009 CMAC 5 para 13).

[8] The Court Martial Appeal Court also clearly stated (see para 30 of *Tupper*) that the fundamental purposes and goals of sentencing as found in the *Criminal Code of Canada* apply in the context of a military justice system and a military judge must consider these purposes and goals when determining a sentence. Section 718 of the *Criminal Code* provides that the fundamental purpose of sentencing is to contribute to the "respect for the law and the maintenance of a just, peaceful and safe society" by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[9] The sentencing provisions of the *Criminal Code*, sections 718 to 718.2, provide for an individualized sentencing process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender (see *R v Angelillo,* 2006 SCC 55, at para 22). A sentence must also be similar to other sentences imposed in similar circumstances (see *R v L.M.,* 2008 SCC 31, at para 17).

[10] The principle of proportionality is at the heart of any sentencing (see *R v Nasogaluak,* 2010 SCC 6, at para 41). The Supreme Court of Canada tells us that proportionality means a sentence must not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence.

[11] However, this principle is counter-balanced by the "just deserts" philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused. In other words, sentencing is also a form of judicial or social censure. But, the degree of censure required to express society's condemnation of the offence must always be limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. These two approaches will result in a sentence that speaks out against the offence and punishes the offender no more than is necessary (see para 42 of *Nasogaluak*).

[12] A judge must weigh the objectives of sentencing that reflect the specific circumstances of the case. It is up to the sentencing judge to decide which objective or objectives deserve the greatest weight. The importance given to mitigating and aggravating factors will move the sentence along the scale of appropriate sentences for similar offences (see *Nasogaluak*, para 43 and 44).

[13] Also, an offender should not be deprived of liberty if less restrictive sanctions other than imprisonment may be appropriate in the circumstances. This general rule of sentencing created by Canadian jurisprudence is now found in section 718.2 of the *Criminal Code of Canada* (see *R v Gladue* [1999] 1 SCR 688, para 40).

[14] Only one sentence is imposed upon an offender, whether the offender is guilty of one or numerous offences, and the sentence may be composed of more than one punishment.

[15] The Court Martial Appeal Court also indicated that the particular context of military justice may, in appropriate circumstances, justify and, at times, require a sentence which will promote military objectives (see *Tupper*, para 34). In the vast majority of the cases tried by court martial, the ultimate aim of sentencing is the restoration of discipline in the offender and in the military society. Thus, the court must impose a sentence that should be the minimum necessary sentence to maintain discipline. The present case is not just one where restoration of discipline is the main aim of sentencing. You are guilty of sexual assault and of breach of trust by a public official. These offences are found in the *Criminal Code of Canada* and, although they were committed on a defence establishment, the victims were not members of the Canadian Forces. As such while maintenance of discipline is always important, the sentencing in this case must align itself with similar criminal cases.

[16] The prosecutor proposed a sentence of imprisonment for a period of 12 months and suggests that the range of sentencing in the present case is 9 to 18 months. He argues that a suspended sentence is not appropriate in the present case. The prosecutor has requested that an order under section 196.14 of the *National Defence Act* for the taking of DNA samples of the offender is required. The prosecutor has also requested the court make an order requiring ex-Petty Officer 2nd Class Wilks to comply with the *Sex Offender Information Registration Act*. The prosecutor has not requested the court make a weapons prohibition order in the present case.

[17] Your defence counsel suggests that a severe reprimand and a fine in the amount of $10,000 is the appropriate sentence. He further argued that, should the court decide that a custodial sentence was appropriate, a period of detention of 90 days would suffice.

[18] I agree with the prosecutor that the principles of general deterrence and denunciation are the most important sentencing principles in the present case.

[19] I will firstly address the aggravating factors of this case.

[20] Sexual assault is objectively a very serious offence since the maximum punishment is imprisonment for 10 years. A breach of trust by a public officer is also a serious offence since it is an indictable offence under the *Criminal Code of Canada* and the maximum punishment for this offence is imprisonment for five years.

[21] As I have already stated in my verdict, you had an important role to play in the enrolment process. You had to perform medical examinations on applicants to ensure the Canadian Forces enrols individuals that are fit and capable of executing the duties that will be imposed on them. You had to perform these medical examinations in accordance with the directives you had received from your superiors. These directives were meant to ensure medical examinations were performed to a standard that ensured the needs of the Canadian Forces were met while ensuring the dignity and the privacy of the applicant were respected. The victims testified they trusted you when you performed the medical examinations and they assumed you were doing what you were

supposed to do. Every reasonable person would expect that a person in the position you occupied at the time of the offences would perform his or her duties in accordance with these directives and with due respect for the dignity and privacy of the applicants.

[22] You examined Able Seaman E.C. and Miss Robi Williams in a manner that allowed you to see their naked breasts. You touched Miss A.D.'s naked breasts with your hands on two occasions. You also examined Miss A.D. on 4 November 2009 in a manner that made her quite uncomfortable when you asked her to bend over when she was only wearing a thong.

[23] You told the victims you had to examine their breasts. They acquiesced to this request because they thought it was part of the enrolment medical examination. You were dishonest with the applicants. You abused their trust.

[24] Also, you were in a position of authority vis-à-vis each applicant. You were involved in the official recruiting process. Each applicant had to report to you to participate in a medical examination as part of her recruiting process.

[25] Miss Robi Williams was 17 years old when you examined her. I find that your actions vis-à-vis Miss Robi Williams amount to abuse of a person under the age of 18 years and as such represents an aggravating factor.

[26] Your actions had some negative impacts on Miss A.D. and Miss Robi Williams. It would appear that Able Seaman E.C. was not affected by your unacceptable and criminal behaviour. Miss A.D. is a single mother of three children. She testified that she lost her dream of joining the Canadian Forces because of your actions. She wants to join the Canadian Forces but she is scared to undergo another recruiting process; she fear this type of incident might happen again. She knows she has to find a way to overcome this fear. She has seen a counsellor to deal with her anxieties and she stated her mother has been very helpful. These incidents have greatly affected Miss A.D.'s self-esteem and feeling of self-worth. Although she testified she intends to speak with a lawyer concerning a possible civil proceeding, I still find her testimony to be credible and of value.

[27] Miss Robi Williams stated she feels disgusted and that she could not look at herself in the mirror after the incident. She had trouble sleeping after the incident and had nightmares. She stated this incident prevented her from graduating from high school. She still thinks about the incident and blames herself for allowing it to happen. She feels uncomfortable around male doctors and dentists and has lost trust in men. She has not undergone any counselling but has spoken with family members and friends and has participated in a sweat lodge.

[28] Miss Robi Williams had reported for a medical examination because she had applied to the Raven Aboriginal Youth Employment Program. The Raven Program is an outreach program designed to build bridges into the Aboriginal communities in Canada and to make Aboriginal youth aware of potential military or civilian careers

with the Department of National Defence. She thought it was the right career path for her since members of her family had already served in the military. She had been interested in applying for that program since 2006. She failed the physical testing component of the recruiting process for the Raven Program. She explained that she felt uncomfortable with the assessors. She thought this failure was an indirect consequence of her medical examination.

[29] I also find that your pattern of abusing your position of authority and the trust of these women is an aggravating factor since we are not dealing with an isolated incident but a calculated and repeated criminal conduct.

[30] I will now examine the mitigating factors. There is very little mitigation evidence in the present case. Defence counsel did not provide the court with any evidence during the sentencing phase of this trial.

[31] Exhibit 8 in the trial, your Member's Personnel Record Résumé (MPRR), indicates that you initially enrolled in the Regular Force in June 1978 as an officer-cadet and were released in August 1978. You were again enrolled in 1984 and served as a medical assistant until you became a medical technician in 2002. You were promoted to the rank of petty officer 2nd class in April 2001. You have not deployed on any international operation but you did testify during the trial that you had served onboard a ship although the court was not provided any details as to how long and in what circumstances.

[32] You are 51 years old and you served in the Canadian Forces for 27 years until you release on medical grounds under item 3(b) on 19 April 2011. You are single and have no dependants. I have been informed by the prosecutor that you do not have a conduct sheet or any criminal convictions; therefore, you are a first-time offender.

[33] I will now examine the jurisprudence presented to the court during the sentencing phase. The prosecutor presented six cases and defence counsel provided one case. I find the cases pertaining to sexual assaults by a medical practitioner on a patient are the appropriate cases to consider when determining the sentence in the present matter. The case presented by defence counsel dealt with harassment and disgraceful conduct and, as such, I do not find it to be very useful.

[34] In *R v Naghara*, [1995] O.J. 1030, the offender was convicted of sexual assault. The intentional touching of one victim, a patient, by a doctor for non-medical purposes was deemed to be a serious breach of trust and should generally deserve a denunciatory sentence. The Ontario Court of Appeal reduced the sentence of 18 months imprisonment to 6 months. This court martial was not presented with additional information concerning that case.

[35] In *R v Cameron*, [1995] P.E.I.J. No. 163, a physician sexually assaulted three female patients while conducting examinations. The offender examined the breasts of the first victim during two examinations and he penetrated the victim's vagina with his

finger during one examination. The offender touched the breasts of the second victim during one examination. The offender examined the breasts of the third victim during two examinations. The Prince Edward Island Court of Appeal reduced the sentence of 23 months imprisonment to 12 months. That court also made note of the duty of trust owed to patients.

[36] I find these two cases offer this court the best guidance in determining a fit sentence. Ex-Petty Officer 2nd Class Wilks was not a doctor at the time of the offences. But he was a medical technician responsible for the enrolment medical examination of the three victims. The Canadian Forces and the victims expected him to perform his duties in a professional and respectful manner. He had to respect the privacy and the bodily integrity of the victims. The three female victims trusted him and obeyed his directions throughout the examinations because they thought they had to in order to proceed along the recruiting process. Miss A.D. testified she would have done anything at that time to join the Canadian Forces.

[37] Ex-Petty Officer 2nd Class Wilks, you used your position of authority to satisfy your desires. You made the three female victims undress unnecessarily to permit you to look at their naked breasts. You also touched the breasts of Miss A.D. under the guise of a medical examination. You abused the trust they put in you. You also abused a person under the age of 18 years.

[38] This court was presented with few mitigating factors. The aggravating factors, the circumstances surrounding the commission of these offences and the moral blameworthiness of the offender lead me to believe that the court must impose a sentence that will provide a clear message to you and others and that will assist you in taking responsibility for those offences.

[39] Your defence counsel has suggested that a sentence of detention for a period of 90 days could be appropriate in this case. It is not. Detention is a form of incarceration whose specific purpose is re-instilling in the offender the habit of obedience in a structured, military setting. Once the sentence of detention has been served, the offender will normally be returned to his or her unit without any lasting effect on his or her career (see Note A to article 104.09 of the QR&O). This punishment cannot be considered in the case of an offender who has been released from the Canadian Forces.

[40] Ex-Petty Officer 2nd Class Wilks, after reviewing the totality of the evidence, the case law and the representations made by the prosecutor and your defence counsel, I have come to the conclusion that the appropriate sentence in this case is imprisonment. I have carefully reviewed the provisions of sections 227, 227.01 and 227.02 of the *National Defence Act*. I shall make an order requiring ex-Petty Officer 2nd Class Wilks to comply with the *Sex Offender Information Registration Act* for a period of 20 years. I have also reviewed the provisions of sections 196.11 and 196.14 of the *National Defence Act*. I shall make an order for the taking of DNA samples of the offender.

[41] I have reviewed the provisions of section 147.1 of the *National Defence Act*. Having considered the nature of the present offences and circumstances of their commission, I have come to the conclusion that an order prohibiting you from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance or all such things is not required in the interests of the safety of any person.

FOR THESE REASONS, THE COURT:

[42] **SENTENCES** you to imprisonment for a period of nine months.

AND

[43] **MAKES** an order requiring you to comply with the *Sex Offender Information Registration Act* for a period of 20 years.

AND

[44] **MAKES** an order for the taking of DNA samples of the offender.

Counsel:

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

Major D. Hodson, Directorate of Defence Counsel Services
Counsel for ex-Petty Officer 2nd Class J.K. Wilks