COURT MARTIAL

Citation: *R v Déry*, 2013 CM 3025

Date: 20130920
Docket: 201307

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Private J.C. Déry, Offender

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

[OFFICIAL ENGLISH TRANSLATION]

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Code*, information that could disclose the identity of the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR SENTENCE

(Orally)

[1] On 20 September 2013, the Standing Court Martial found Private Déry guilty of a service offence punishable under section 130 of the *National Defence Act*, in that he, on or about 25 October 2011, at Canadian Forces Base Wainwright, Alberta, did sexually assault I.F., contrary to section 271 of the *Criminal Code* It now falls to me, as the military justice presiding over this Standing Court Martial, to pass sentence.

[2] 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.

[3] 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 noted on that same page 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.

[4] In this case, counsel for the prosecution suggested that the Court impose a sentence of imprisonment for a term of 90 days and dismissal from Her Majesty's service. Counsel for the defence, on the other hand, recommended that the Court sentence his client to a severe reprimand and a fine ranging from $2,000 to $3,000.

[5] 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.

[6] 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 degree of responsibility and previous character of the offender should be taken into account;

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 increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[7] The Court is of the opinion that sentencing in this case should focus, first, on the objective of denunciation of unlawful conduct and, second, on 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.

[8] Exercise MAPLE RESOLVE took place from 11 September 2011 to the end of October 2011 on the training area at CFB Wainwright in Alberta. Taking part in the exercise was 2 Canadian Mechanized Brigade Group, of which 2 HQ and Sigs Squadron is a part. The unit's camp for this exercise was located on the training area. It consisted of modular tents where the unit's members, divided into troops, slept. The exercise ended on 24 October. To mark the occasion, the unit held a small celebration that involved a "smoker", a kind of barbecue, for supper. The entire exercise was alcohol free, that is, the consumption of alcohol was not permitted, but that day, alcohol was distributed with supper, and alcohol was sold throughout the evening. After supper, some people brought alcohol back to their tents. Members of the unit of the complainant, I.F., brought alcohol back to their tent, and people played music on their cellular telephones or other devices hooked up to speakers and socialized.

[9] I.F. joined the revellers a little later in the evening, in her tent. Private Déry, who was with B Troop, had already been in I.F.'s tent for some time when she arrived. The tent where he was belonged to members of A Troop, and I.F. was a member of A Troop. She had known Private Déry for some time. Private Déry allegedly followed I.F. whenever she left and returned to her tent, at least five times during the evening,

and he allegedly made sexual advances to her, which she says she refused each time. Around midnight, everyone went to bed. When people were leaving the tent, Private Déry allegedly made one last advance towards I.F. while she was sitting on her cot. She once again turned him down. I.F. quickly fell asleep, owing to her fatigue and the alcohol she had consumed that evening.

[10] The modular tent where I.F. slept consisted of five modules attached together. The modular tent is rectangular in shape. The entrance is located on one of the rectangle's short sides, and the other short side is the back of the tent. From the tent entrance looking in, the complainant's cot is located in the very back, on the right. The cot is against or very close to the back wall of the tent. . The complainant was woken up by a hand in her underwear, rubbing her clitoris. She then saw Private Déry's face, which was next to hers, about six inches away. Half of Private Déry's body had slipped in under the modular tent and over her cot, and he had his left hand in the complainant's underwear. She immediately froze and then pushed him off, telling him not to do that. She then went over to another empty cot near hers, taking her sleeping bag and cellular telephone with her. She then started crying and finally left the tent to find Corporal Foster, who was in a different tent.

[11] In the Court of Appeal of Québec's decision in *R v L.(J.J.)*, 1998 CanLII 12722 (QCCA), Justice Otis, writing for the Court, listed a series of factors characterizing the criminal responsibility of an offender with regard to passing sentence for sexual offences, including the following:

a) the nature and the intrinsic seriousness of the offences, which is affected by, in particular, use of threats, violence, psychological pressure and manipulation;

b) the frequency of the offences and the time period over which they occurred;

c) the abuse of the relationship of trust and authority between the offender and the victim;

d) the disorders underlying the commission of the offence: the offender's psychological difficulties, disorders and deviancy, intoxication, etc.;

e) the offender's prior convictions, their proximity in time to the alleged offence and the nature of the prior convictions;

f) the offender's behaviour after the commission of the offences: confessions, collaboration in the investigation, immediate involvement in a treatment program, potential for rehabilitation, financial assistance if necessary, compassion and empathy for the victims;

g) the time between the commission of the offences and the guilty verdict as a mitigating factor depending upon the offender's behaviour (the offender's age, social integration and employment, commission of other offences); and

h) the victim: gravity of the attack on his or her physical or psychological integrity reflected by, in particular, age, the nature and extent of the assault, the frequency and duration of the assault, the character of the victim, his or her vulnerability (mental or physical handicap), abuse of trust or authority, lingering effects.

[12] 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. Other factors may still be considered, as this list is not exhaustive.

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

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

a) The objective seriousness of the offence. You have been found guilty of a service offence, that is, an offence under section 271 of the *Criminal Code*, which is punishable by imprisonment for a term not exceeding 10 years, or by less punishment.

b) The subjective seriousness. And in this regard, the Court considers four factors:

i. First, there is a breach of trust. Without going into great detail, it is clear that in a military context, and as counsel for the prosecution stated, one of the fundamental elements is the fact that each member of the Army, Navy or Air Force must be able to trust his or her peers, subordinates and superiors. This is crucial to the success of an armed force. And when, in

circumstances such as those described to the Court, a Forces member, for his or her own purposes, takes advantage of a situation where another member is sleeping and has to trust the people around him or her, the Court can only see this as an aggravating factor.

ii. In addition, the circumstances show that there was a form of premeditation, given the advances that Private Déry made earlier in the evening. When the complainant made it clear that she was not interested, that should have been enough. This reflects the fact that the idea was planted in Private Déry's mind and grew as the night went on, which indicates that there was a sort of premeditation. This, too, is an aggravating factor.

iii. Second, there is what I would call the disorder underlying your actions. In acting as you did, you caused the complainant a form of psychological distress in the short term and in the long term. You also caused problems in your work environment, as well as hers, in the short term and probably in the medium term.

iv. There is also the serious harm done to the victim. I think that in personal terms, be it in terms of, particularly in psychological terms, it is clear to the Court that the complainant is still trying to get past this in personal terms. She still had scars from this event, continued seeing a psychiatrist, psychologist and an addictions counsellor. She has clearly lost trust in men, in the military. She clearly stated that she did not feel safe at all among other Forces members while on exercises, and in this regard, she has become even more vulnerable. She was in a vulnerable situation at the time of the commission of the offence and has become even more fragile. The Court must consider these factors to be aggravating factors in the present case.

[15] Of course, there are mitigating factors that I will take into consideration:

a) First, there is your age. Indeed, you had two years of experience in the Canadian Forces when the offence was committed, and there is your age, 23 years. You still have many years ahead of you to become and remain a positive element and to contribute positively to this society;

b) There is also your work performance. I have no doubt that you are an excellent signalman, and the evidence submitted by your lawyer supports

this. To date, you have had an excellent military career despite the fact that you have been somewhat relegated to the sidelines and had your promotion delayed. In such circumstances, you have continued to perform, and in this regard, I must recognize this as a mitigating factor;

c) There is also the fact that you had to face this Court Martial. The Court Martial is public and therefore accessible to people who are interested in knowing what is going on in this case. It is a part of military justice. Obviously, the fact that this Court Martial is public also formalizes the court proceedings. It is clear to me that this will have a deterrent effect not only on you, but also on others who might be tempted to engage in similar conduct;

d) As was mentioned by your lawyer, this also appears to be an isolated and highly unusual act for you. Very little was introduced regarding your character, but it appears that this is not something that you do regularly or even occasionally. It is very different from who you normally are;

e) There is also the fact that you have a clean conduct sheet, which shows that this is a first offence in the circumstances, and this too is a mitigating factor.

[16] Now, I have taken into account the circumstances in which the offence was committed. I have considered the applicable sentencing principles, which I cited previously. I have thus also considered the sentences that have been imposed by other military courts on similar offenders for similar offences committed in similar circumstances. I have taken into account the aggravating factors and the mitigating factors, and I have come to the conclusion that no penalty or combination of penalties apart from incarceration would seem to be the least serious, necessary and appropriate in this case. I am aware that the Court must impose such a penalty as a last resort, and the Court considered this before arriving at this conclusion.

[17] Now there is the type of sentence that should be passed. There is detention and imprisonment. In the circumstances of the case, and as counsel for the prosecution said, the only type of incarceration that the Court finds to be appropriate in the circumstances is imprisonment, since detention is designed to rehabilitate and in the circumstances the Court does not see how such a measure could have an impact, given the nature of the offence and the circumstances. Therefore, in the opinion of the Court, also adapting a perspective that is not just disciplinary but also criminal, considering that this is a *Criminal Code* offence, the Court, from this perspective, has no choice but to consider imprisonment. The question at this point is what should be the term of such a sentence to ensure respect for the law and to maintain discipline.

[18] Having reviewed the case law, and ever mindful of the applicable principles and objectives of sentencing, particularly denunciation and deterrence, I find that a sentence of imprisonment for a term of 30 days would be appropriate and fair in the circumstances. It is true that there are certain aggravating factors, particularly the abuse of trust and the impact on the complainant, that are important, but on the other hand, there are several mitigating factors, including the fact that this is an isolated act, and that this is a first offence for you, which means that the Court does not think it necessary in the circumstances to impose a sentence of three months, as suggested by the prosecution, instead of a short term of imprisonment to ensure that the objectives are met.

[19] I now turn to the issue of dismissal. The Court finds that dismissal serves first and foremost to denounce conduct that shows a striking failure to live up to military values and should only be used in special circumstances. I am of the opinion that in the case of Private Déry, this does not apply. As I discussed in my decision in *Moriarity*, the fact that a Forces member is in a leadership position with responsibilities at a relatively high level should be considered for such a sentence. It is true that Private Déry betrayed the trust that the complainant had placed in him, as in all the other members around her, but the Court finds that incarceration in the form of imprisonment serves both to denounce and to deter just as much where the Court exercises a concurrent criminal jurisdiction as where it exercises a disciplinary jurisdiction. Therefore, a sentence of imprisonment is amply sufficient in the circumstances of this case to achieve these objectives. Dismissal, in my view, is not necessary to achieve the objectives from the standpoint of military discipline.

[20] Accordingly, a fair and just punishment should recognize the gravity of the offence and the responsibility of the offender in the context of the particular case. In the view of the Court, imprisonment for a term of 30 days is the minimum, appropriate sentence and is one that fits the crime.

[21] Furthermore, pursuant to section 196.14 of the *National Defence Act*, and considering that the offence for which I have passed sentence is a primary designated offence within the meaning of section 196.11 of the *National Defence Act*, I hereby order, as appears from the prescribed form attached hereto, the taking of the number of samples of bodily substances from Private Déry that is reasonably required for the purpose of forensic DNA analysis.

[22] Pursuant to section 227.01 of the *National Defence Act*, considering that the offence of which I have found the offender to be guilty is a designated offence within the meaning of section 227 of the *National Defence Act*, I order you, as appears from the prescribed form attached hereto, to comply with the *Sex Offender Information Registration Act* for a period of 20 years, in accordance with paragraph 227.02(2)(*b*) of the *National Defence Act*.

[23] I also considered the question of whether it is appropriate in this case to make an order prohibiting the offender from possessing a weapon, even though section 147.1 of the *National Defence Act*, even though that section does not require me to do so in the circumstances. In my view, such an order is neither desirable nor necessary for the safety of others or of the offender in the circumstances of this trial.

FOR THESE REASONS, THE COURT

[24] **SENTENCES** Private Déry to imprisonment for a term of 30 days.

[25] **ORDERS** the taking of the number of samples of bodily substances from Private Déry that is reasonably required for the purpose of forensic DNA analysis, in accordance with section 196.14 of the *National Defence Act*.

[26] **ORDERS** you to comply with the *Sex Offender Information Registration Act* for a period of 20 years, in accordance with paragraph 227.02(2)(*b*) of the *National Defence Act*.

Counsel:

Major A.-C. Samson, Canadian Military Prosecution Service
Major M. Pecknold, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

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Counsel for Private J.C. Déry