COURT MARTIAL

Citation: *R. v. Martel*, 2010 CM 3004

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Standing Court Martial

Valcartier Garrison
Courcelette, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Corporal Martel, Offender

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Code*, information that could disclose the identity of the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.

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

OFFICIAL ENGLISH TRANSLATION

REASONS FOR SENTENCE

[1] The Court Martial having accepted and recorded your admission of guilt on the second count, the Court now finds you guilty of this count. Regarding the first count, it should be noted that it was withdrawn by the prosecution. Consequently, the Court has no other counts to dispose of.

[2] As the military judge presiding at this standing court martial, it now falls to me to determine the sentence.

[3] As Justice Gendreau wrote in *R. v. S.T.*, 2007 QCCA 1447 (CanLII) at paragraph [14], and I quote:

[TRANSLATION]

> [14] Sentencing is without a doubt one of the most difficult and sensitive tasks that judges perform as part of their judicial duties. Finding and applying the most just and equitable standard for the accused while adequately conveying society's disapproval and protecting the public is a complex balancing exercise involving values that, although they are not contradictory, have different objectives.

[4] 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 a more positive way, to promote good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trustworthy and reliable manner, successful missions.

[5] The military justice system 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.

[6] It has long been recognized that the purpose of a separate system of military justice or courts is to allow the Canadian Forces to deal with matters that pertain to the code of service discipline and the maintenance of the effectiveness and morale of the troops. That being said, the punishment imposed by any court, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances of the case. It also goes directly to the duty imposed on the Court to impose a sentence commensurate with the gravity of the offence and the previous character of the offender, as stated at subparagraph 112.48(2)(*b*) of the QR&O.

[7] In this case, the prosecution and defence counsel have presented a joint submission on sentencing. They have recommended that the Court sentence you to three months' imprisonment. The Court Martial is not bound by this recommendation. However, it is well established in case law that there must be compelling reasons for the Court to disregard it. It is also generally recognized that the Court should accept the recommendation unless doing so would be contrary to the public interest or bring the administration of justice into disrepute.

[8] The Court has taken into consideration the respective recommendations made by counsel in light of the relevant facts as they emerge from the summary of the circumstances. It has also considered the recommendation in light of the relevant sentencing principles, among others, those set out in sections 718, 718.1 and 718.2 of the *Criminal Code*, insofar as those principles are not incompatible with the sentencing regime provided under the *National Defence Act*. Those principles are as follows: first, protection of the public, and here the public includes the interests of the Canadian Forces; second, punishment of the offender; third, the deterrent effect of the sentence, not only for the offender but also for any person who might be tempted to commit such offences; fourth, separation, where necessary, of offenders from the rest of society, including members of the Canadian Forces; fifth, the imposition of sentences similar to those imposed on offenders for similar offences committed under similar circumstances; and sixth, the rehabilitation of the offender and reintegration of the offender into

society. The Court also took into account the submissions made by counsel, *inter alia* the case law they cited and the documents filed in evidence, including the victims' statements regarding the consequences of the crime and the sexologist's assessment report.

[9] The Court agrees with counsel for the prosecution that the need to protect the public from this specific type of sexual offence requires the imposition of a sentence that emphasizes denunciation and general and specific 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.

[10] The case before this Court involves the offence of sexual interference for touching a person under the age of 14 years for a sexual purpose. This is a very serious offence, but the Court intends to impose what it considers to be the minimum sentence applicable in the circumstances.

[11] The courts are very sensitive to sexual offences. In a military context, such offences have an impact on unit cohesion and morale, particularly where the victims are members of the Canadian Forces or are members' relatives or loved ones. Essentially, this affects the trust and respect that Forces members and others in the military community must share so that each mission assigned to the Canadian Forces is accomplished successfully. Members must be able to rest assured that they can give their full attention to their duties without having to worry about their families and other loved ones.

[12] In the decision of the Court of Appeal of Québec in *R. v. L.(J.J.)* 1998 CanLII 12722 (QCCA), leave to appeal to the Supreme Court refused (see [1998] 2 S.C.R. viii), Justice Otis 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 occur.
>
> c. The abuse of the relationship of trust and authority between the offender and the victim.
>
> d. The disorders underlying the commission of the offences: the offender's psychological distress, pathologies and deviance, intoxication . . . .
>
> 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 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 . . . .

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

[14] In arriving at what it considers to be a fair and appropriate sentence, the Court has also considered the following aggravating and mitigating factors.

[15] Firstly, the objective seriousness of the offence. You have been found guilty of an offence under section 130 of the *National Defence Act*, for sexual interference contrary to section 151 of the *Criminal Code*. This offence is punishable by imprisonment for a term not exceeding 10 years or less punishment.

[16] Secondly, the subjective seriousness of the offence. You have callously taken advantage of the trust and vulnerability of a child in circumstances that placed her in your care. Furthermore, the offence was committed in a military establishment at the very heart of a military community.

[17] You showed no restraint and were only thinking of satisfying your own needs when you crossed the line as an adult in whom the victim had complete trust. Despite her emotional and psychological fragility stemming from her worries about her father, you did not think twice about touching her sexually, without considering how old she was or what consequences your actions might have.

[18] The physical and psychological security of individuals in Canadian society is a fundamental value entrenched in our constitution. Furthermore, as a member of the Canadian Armed Forces, you did not think twice about violating one of its basic principles, which is to respect the dignity of all persons. What is more, because of special circumstances, the victim's parents placed their complete trust in you to look after her. You betrayed them, when they thought that they had nothing to worry about concerning their child. You can easily understand that abusing the trust placed in you by a child and her parents so that you could commit such reprehensible acts is a very serious aggravating factor in the circumstances.

[19] Since the incident, you have not always tried to identify what led you to commit such actions, nor have you tried to understand what happened to you or see to it that

something like this never happens again. In view of the possibility that all of the factors that allowed such a thing to happen could arise again, the fact that you have done nothing to understand this and take steps to avoid re-offending is another aggravating factor that the Court must take into account.

[20] Finally, the gravity of the physical damage because of your actions and the body parts you touched is raised, but the psychological effects on the victim and her mother are also especially serious. You took a 12-year-old girl who has struggled and is still struggling to lead a normal life and shattered her life. She still fears for her own safety when she is alone and no longer has any self-esteem. Her psychological and emotional equilibrium has been dealt a heavy blow, and no one can say whether she will ever regain it.

[21] As for her mother, in addition to enduring a major upheaval in her family life, the reasons for which it took nearly three years to discover, she found her personal and professional life turned upside down because of your having committed this offence.

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

> Your plea of guilty is clearly a sign of remorse and that you are sincere in your intention to remain a valid asset to Canadian society.
>
> The absence of a conduct sheet or criminal record for similar offences.
>
> The fact that when you were confronted by police investigators regarding this incident, you immediately co-operated. Moreover, you clearly conveyed your intention to plead guilty at the first possible opportunity and did so.
>
> The lack of premeditation with regard to the commission of the offence. A set of circumstances came together, one after the other, leading you to be confronted with a highly unusual opportunity, one which you unfortunately took advantage of. It is unlikely that you will re-offend, but it is nevertheless important that you seek professional help to ensure that this behaviour, as unusual as it may be for you, never happens again.
>
> The relatively short duration of the incident, the lack of repetition and the lack of violence in addition to the violence intrinsically related to the incident.
>
> The fact that you had to face this Court Martial, which was announced and accessible to the public and which took place in the presence of some of your colleagues, has no doubt had a very significant deterrent effect on you and on them. The message is that the kind of conduct that you displayed will not be tolerated in any way and will be dealt with accordingly.

[23] Regarding this Court's sentencing of Corporal Martel to incarceration, it was established in the Supreme Court of Canada's decision in *R. v. Gladue,* [1999] 1 S.C.R. 688 at paragraphs 38 and 40 that sentence of incarceration is a penal sanction of last resort. The Supreme Court noted that incarceration in the form of imprisonment is to be

used only where no other sanction or combination of sanctions is appropriate to the offence and the offender. This Court feels that these principles are relevant in the context of military justice, taking into account, nonetheless, the important differences between the sentencing rules that apply to a civilian court hearing a criminal or penal case and the rules that apply to a military court whose powers of punishment are set out in the National Defence Act.

[24] Moreover, this approach was reaffirmed by the Court Martial Appeal Court in *R. v. Baptista*, 2006 CMAC 1, at paragraphs 5 and 6, where it held that imprisonment should be considered only as a last resort.

[25] The civilian criminal justice system has its own unique features, such as a conditional sentence, which differs from probationary measures but is nonetheless a genuine prison sentence, is applied according to different terms, and allows the offender to serve his or her custodial sentence in the community, where it is possible to combine the punitive and corrective objectives, as indicated by the Supreme Court in *Proulx*. The military justice system, however, has disciplinary tools such as detention, which seeks to rehabilitate service detainees and re-instil in them the habit of obedience in a military framework organized around the values and skills unique to members of the Canadian Forces. Detention can have a significant effect in terms of denunciation and deterrence, while at the same time not stigmatizing service detainees to the same degree as members of the military who are sentenced to imprisonment, as stated in the Notes added to articles 104.04 and 104.09 of the QR&O.

[26] However, in the case of a member of the Canadian Forces who has already been released, the objectives of a sentence of detention are no longer relevant, and the remaining form of incarceration specified in the scale of punishments, which is imprisonment, must alone be considered.

[27] In addition, when the impugned act falls outside the disciplinary framework and constitutes a true criminal activity, it is necessary to examine the offence not only in light of the particular values and skills of members of the Canadian Forces, but also from the perspective of the exercise of concurrent criminal jurisdiction.

[28] A review of the case law of military and civilian courts regarding sentencing for an offence of a similar nature in similar circumstances leads me to conclude that a sentence of incarceration is reasonable in the circumstances. Moreover, regarding the term, I do not think that a long prison sentence, such as 12 months or more, should be applied in the circumstances. Therefore, counsel's joint submission that the Court impose a sentence of imprisonment for a term of three months is reasonable in my view, given the context of this case.

[29] A just and equitable sentence should take into account the seriousness of the offence and the offender's degree of responsibility in the particular circumstances of the case. Therefore, considering that no other sanction or combination of sanctions is appropriate to the offence and the offender in this case, the Court is of the opinion that the joint submission is reasonable in the circumstances. Accordingly, it will accept the

recommendation made by counsel to sentence you to imprisonment for a term of three months, considering that this sentence is not contrary to the public interest and would not bring the administration of justice into disrepute.

[30] Corporal Martel, stand up. The Court sentences you to imprisonment for a term of three months.

[31] Furthermore, in accordance with 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 order, as appears from the attached regulation form, that any number of samples of bodily substances that is reasonably required be taken from Corporal Martel for the purpose of forensic DNA analysis.

[32] Finally, in accordance with section 227.01 of the *National Defence Act*, and considering that the offence for which I have passed sentence is a designated offence 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 a period of 20 years.

[33] The proceedings in the matter of the Standing Court Martial of ex-Corporal Martel are now concluded.

Counsel

Major J. Caron, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Lieutenant(N) M. Létourneau, Directorate of Defence Counsel Services
Defence counsel for ex-Corporal Martel