COURT MARTIAL

Citation: *R v Lewis*, 2012 CM 2006

Date: 20120509
Docket: 201205

Standing Court Martial

Royal Military College of Canada
Kingston, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Colonel (ret'd) W.J. Lewis, Offender

Before: Commander P.J. Lamont, MJ

REASONS FOR SENTENCE

(Orally)

[1] Colonel Lewis, having accepted and recorded your plea of guilty to the charge in the charge sheet, a charge that you did, with intent to deceive, alter a document made for a departmental purpose contrary to s. 125(*c*) of the *National Defence Act*, and having considered the alleged and admitted facts of the offence, this court now finds you guilty in respect of the charge.

[2] It now falls to me to determine and to pass a sentence upon you. In so doing I have considered the principles of sentencing that apply in the ordinary courts of criminal jurisdiction in Canada and at courts martial. I have as well considered the facts of the case as disclosed in the evidence heard during this sentencing hearing, as well as the submissions of counsel, both for the prosecution and for the defence.

[3] The principles of sentencing guide the court in the exercise of its discretion in determining a fit and proper sentence in each individual case. The sentence should be broadly commensurate with the gravity of the offence and the blameworthiness or de-

gree of responsibility and character of the offender. The court is guided by the sentences imposed by other courts in previous similar cases, not out of a slavish adherence to precedent, but because it appeals to our common sense of justice that like cases should be treated in similar ways. Nevertheless, in imposing sentence the court takes account of the many factors that distinguish the particular case it is dealing with, both the aggravating circumstances that may call for a more severe punishment and the mitigating circumstances that may reduce a sentence.

[4] The goals and objectives of sentencing have been expressed in different ways in many previous cases. Generally, they relate to the protection of society, of which, of course, the Canadian Forces is a part, by fostering and maintaining a just, a peaceful, a safe, and a law-abiding community. Importantly, in the context of the Canadian Forces, these objectives include the maintenance of discipline, that habit of obedience which is so necessary to the effectiveness of an armed force. The goals and objectives also include deterrence of the individual so that the conduct of the offender is not repeated, and general deterrence so that others will not be led to follow the example of the offender. Other goals include the rehabilitation of the offender, the promotion of a sense of responsibility in the offender, and the denunciation of unlawful behaviour. One or more of these objectives will inevitably predominate in crafting a fit and just sentence in an individual case, yet it should not be lost sight of that each of these goals calls for the attention of the sentencing court, and a fit and just sentence should reflect a proper blending of these goals, tailored to the particular circumstances of the case.

[5] S. 139 of the *National Defence Act* prescribes the possible punishments that may be imposed at court martial. Those possible punishments are limited by the provision of the law which creates the offence and provides for a maximum punishment. Only one sentence is imposed upon an offender whether the offender is found guilty of one or more different offences, but the sentence may consist of more than one punishment. It is an important principle that the court should impose the least severe punishment that will maintain discipline.

[6] In arriving at the sentence in this case, I have considered the direct and indirect consequences for the offender of the finding of guilt and the sentence I am about to pronounce.

[7] Members of the Canadian Forces are required by Defence Administrative Orders (DAOD 5023-2 entitled “Physical Fitness Program") to maintain a minimum standard of physical fitness prescribed by the CF EXPRES programme. As part of the programme, members are evaluated annually. A pass rating is recorded on a form, DND 279, CF EXPRES programme, and is valid for one year. If a higher standard of physical fitness is met under what is called the “incentive programme,” the result is referred to as an exemption and is valid for two years. On the date alleged in the charge Colonel (now retired) W.J. Lewis was the head of the applied military science department of the Royal Military College of Canada (RMC) in Kingston. In this position he was the commanding officer for all military post-graduate students attending the college. As well, he was responsible for the administration of his department. On 16 March 2011, a month

prior to the offence date, Commodore Truelove, the commandant of the Royal Military College and Colonel Lewis's military superior, was preparing annual personnel evaluation reports (PERs) for his subordinates, including Colonel Lewis. A box on the PER form entitled "fitness test" has 5 options – pass, exempt, medically excused, fail, and not tested. Commodore Truelove emailed Colonel Lewis asking him to confirm that his EXPRES test was not expired. Colonel Lewis replied by email the same day falsely stating that he had received an exemption on his CF EXPRES test, and in April Commodore Truelove completed the PER form with this incorrect information. As part of the normal review process before final signature by the commander of the Canadian Defence Academy, Major Myers noticed a discrepancy between the information recorded on the PER as to Colonel Lewis's fitness status and information recorded on the member's personnel record résumé. This document showed that Colonel Lewis last completed the EXPRES test in April of 2008, and therefore his last fitness test result had expired. Major Myers inquired of Colonel Lewis's unit and later Colonel Lewis sent an email to Major Myers falsely stating that a clerk had told him that he had passed his physical fitness test on 14 April 2010. Major Myers then requested a copy of Major Lewis's CF EXPRES test form, the DND 279. Colonel Lewis then went into the shadow file of one of his subordinates, Lieutenant-Colonel Beausejour, copied Lieutenant-Colonel Beausejour's CF EXPRES test form, altered it to make it appear as his own and that he had received an exemption on the CF EXPRES test on 14 April 2011, scanned the document and sent it by email to Major Myers. Major Myers thought the document supplied to her by Colonel Lewis had been tampered with. An investigation was conducted in the course of which Colonel Lewis admitted to the investigators that he falsified the CF EXPRES test form intending to deceive his military superior, his chain of command, and the administrative support staff. He stated that he felt trapped when asked to supply a copy of the form after falsely stating that he had completed the test.

[8] On these facts the prosecution recommends a sentence of reduction in rank to the rank of lieutenant-colonel and a fine in the amount of seven to eight thousand dollars. Defence counsel on behalf of Colonel Lewis submits that reduction in rank cannot be imposed because since the date of the commission of the offence the offender has been released from the Canadian Forces, and argues that even if reduction in rank can lawfully be imposed upon a released member, it is not a fit punishment in all the circumstances. The defence submits that a fit sentence would be a fine in the amount of $4,000.

[9] Counsel on behalf of the offender submits that the punishment of reduction in rank is not a lawful punishment because the offender has been released from the CF since the date of the offence. Counsel points to the decision of the Court Martial Appeal Court in the case of *R v Tupper*, 2009 CMAC 5, in support of the proposition that the distinctively military punishments set out in s. 139 of the *National Defence Act* do not apply to an offender who has been released from the CF. According to counsel, the only punishments that can lawfully be imposed upon a released former member are imprisonment and a fine.

[10] In *Tupper* the offender was tried and convicted by a Disciplinary Court Martial on several charges under the *National Defence Act*, and was sentenced to dismissal and detention for a period of 90 days. He was immediately released from detention by the sentencing judge, the Chief Military Judge (CMJ), pending his appeal to the Court Martial Appeal Court. On appeal from the severity of the sentence the appellant submitted, as the second of two grounds, that the sentence imposed was harsh and excessive. Trudel J.A. (Nadon J.A. concurring) delivered the reasons of the majority of the court. She held that "the punishment of dismissal was not inappropriate" (paragraph 47), and dismissed the second ground of appeal as she "found the sentence to be demonstrably fit" (paragraph 79).

[11] She then went on to state:

> [59] There is no doubt that the sentence is severe. Nonetheless, I would have ended the matter here but for one reason: in June 2008, pending this appeal, Private Tupper was administratively released from the Canadian Forces for unsatisfactory conduct, pursuant to QR&Os 15.01 (item 2 (a))
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> ...
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> [60] This new fact raises the question of the enforceability of the sentence. Considering its terms, one would have expected Private Tupper to serve his time in detention, as a member of the Canadian Forces, and then to be dismissed.
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> [61] This sequence of events would have served the purposes and goals of the sentence meticulously crafted by the CMJ where denunciation and general deterrence were emphasized while considering the personal circumstances of Private Tupper and his need for treatment to control his dependency to drugs.
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> [62] The reality is now completely different. Private Tupper has resumed his life as a civilian. He has since gained control over his drug addiction and is attending school to obtain a high school diploma.
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> [63] Had the CMJ known that Tupper would be administratively released pending his appeal, I am convinced that he would have crafted a sentence better suited to the appellant's new status as a civilian, one that could be executed even after the appellant's release.
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> [64] However, I need not speculate as to what the proper sentence might have been as I believe that the finality of the administrative release has made the punishments of dismissal and detention inoperative.

And at paragraph 67:

> As Private Tupper has already been released from military service, it follows that he can no longer be subjected to punishments reserved for soldiers. Having been released, he cannot subsequently be dismissed from the Canadian Forces. Similarly, he cannot be placed back into a uniform to serve a period of detention in military barracks.

And at paragraph 70:

> In the present instance, the remission of sentence is the direct result of an administrative intervention into the military justice process.

And, finally, at paragraph 79:

> For these reasons, I would grant leave to appeal and [although] this appeal—check that—and allow this appeal and although I have found the sentence to be demonstrably fit, I would set aside the punishments of dismissal and detention as they are inoperative following the appellant's administrative release from the Canadian Forces.

It is on the strength of these observations and conclusions that counsel before me in this case argues that since Colonel Lewis is now released from the Canadian Forces having retired, the only punishments that can lawfully be imposed are imprisonment and a fine.

[12] Ordinarily a lower court is bound to follow the law as expressed by a higher court. This is part of the principle of *stare decisis*, in English, to stand by things already decided. But there are exceptions to the rule that prior decisions must be followed, and one of the exceptions is when a ruling can be said to have been made *per incuriam*. In the present case the prosecution argues that this court is not bound by the *stare decisis* rule to hold, following *Tupper*, that the punishment of reduction in rank cannot be applied to a released member of the CF because the decision of the CMAC was made *per incuriam*. I was referred to the decision of the British Columbia Supreme Court in *R. v. Pereira*, 2007 BCSC 472, where Romilly J., considered the decision of the British Columbia Court of Appeal in *R. v. W.(P.H.L.)*, 2004 BCCA 522, and wrote under the rubric "Was *W.(P.H.L.)* decided *per incuriam*?" at paragraph 46, as follows:

> [46] The term "per incuriam", which can be translated as "for want of care", refers to a decision that has been rendered without reference to relevant statute or case law, and therefore does not bind lower courts.
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> [47] In summary, the central hallmarks of a *per incuriam* decision are the following:
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> 1. The decision was made in ignorance or forgetfulness of a relevant statute or binding authority which is inconsistent with the decision; and
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> 2. Had the court considered the relevant statute or authority, its decision would have been different.
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> Findings that a previous decision was made *per incuriam* should be rare."

[13] In this case the prosecution submits that the decision in *Tupper* was made without regard for QR&O Chapter 15 dealing with the release of members of the CF. Article 15.03 is headed "date of release" and provides in subsection (1):

> "(1) In the case of a punishment of dismissal with disgrace from Her Majesty's service or dismissal from Her Majesty's service awarded by a court martial, the date of release shall be as soon as practicable after the awarding of the punishment."

[14] In my view, while ordinarily the sentence of a court martial is, since the amendments to the *Act* in 1999, effective from the date of pronouncement pursuant to section 195 of the *National Defence Act*, QR&O article 15.03(1) makes it clear that a sentence of dismissal imposed by a court martial does not of itself operate to separate the offender from the CF as of the date of pronouncement of the sentence. It is only once the administrative process contemplated by Chapter 15 is completed "as soon as practicable" after the imposition of a sentence of dismissal that the offender is released, regains his status as a civilian, and is no longer a member of the CF. But the punishment of dismissal in *Tupper* was under appeal at the time the release was processed. It appears to me that this is the reason Tupper was given the release item 2(a) "unsatisfactory service" rather than item 1(a) "sentenced to dismissal." In this respect then, the release of Tupper was indeed a "administrative intervention into the military judicial process" because the administrative release was processed at a time when the appeal court had under consideration the fitness of the punishment of dismissal imposed at trial. I am, therefore, unable to say, as the prosecutor argues, that the majority decision of the CMAC was delivered in ignorance or forgetfulness of the provisions of QR&O dealing with release.

[15] In any event, I consider that it does not fall to me to decide whether the Court Martial Appeal Court in *Tupper* was forgetful or ignorant of a relevant statute that is inconsistent with its decision, and I make no such finding. In *Smith v. Atlantic Wholesalers Ltd.*, 2012 NSSC 14, Justice Wood of the Nova Scotia Supreme Court considered that a finding by a lower court that a previous decision was made by a higher court *per incuriam* entitled the lower court to decline to follow the previous decision (paragraph 43). With respect, I have substantial doubt that this proposition accurately states the law. In my view a finding that a previous decision was made *per incuriam* entitles a court to refuse to follow its own previous decision, but not to decline to apply the law as elucidated by a higher court. For this reason, in the course of argument in this case, I declined to hear the submission of the prosecutor that the decision of the CMAC in *Tupper* was made *per incuriam*. If that submission has merit it is a point to be taken before the Court Martial Appeal Court, not this court. (see *R. v. Toronto Star Newspapers Ltd*, a decision of Durno J., of the Ontario Superior Court of Justice dated March 1, 2007.)

[16] This court, as a lower court, is bound by the principle of *stare decisis* to follow the decisions of the Court Martial Appeal Court. But the doctrine of *stare decisis* applies only to the *ratio decidendi;* that is, what it was that was actually decided in the previous case, that is binding upon the court, and does not necessarily extend to other statements, called "*obiter dicta*," that may be made in the course of the reasoning of the higher court. As Binnie J., speaking for the Supreme Court of Canada stated in *R. v. Henry*, 2005 SCC 76 at paragraph 57:

> 57 The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All *obiter* do not

> have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.

[17] In *Henry* the Supreme Court of Canada was considering the application of the *stare decisis* rule to its own previous decisions, but, in my view, the holding of the court applies also to a consideration of the binding authority of previous decisions of a higher court, such as the CMAC, upon a lower court such as a court martial. And so the issue I must address is what was the *ratio decidendi* in *Tupper*? As Binnie J. instructs us, one must first have regard for the facts of the earlier case. At the time of sentencing Tupper was still a member of the CF, and would remain a member until the punishment of dismissal was effected by release. By the time of his appeal he had been properly released from the CF and the rehabilitative objectives of the sentence imposed at trial were substantially met. In these circumstances it appears that a majority of the CMAC were of the view that although the sentence was fit at the time it was pronounced, the circumstances had changed considerably by the time of the appeal. In my view, *Tupper* supports the propositions that:

1. A sentencing court must take account of all the relevant circumstances that are personal to the offender, including whether the offender will continue to serve or has been released, or is likely to be released in the near future; and

2. Where those personal circumstances change between the time of sentencing at trial and an appeal from sentence, then the CMAC will consider the change in circumstances and decide whether the sentence imposed at trial remains a fit sentence.

[18] In the present case, the offender has already been released. It may be that because of this circumstance some of the punishments available under section 139 of the *National Defence Act* would not have the same effect upon the present offender as they would upon a member who continues to serve, and for that reason would not advance the goals of sentencing to which I have already referred. But these are reasons for carefully weighing whether a particular punishment is appropriate, not for holding that a certain punishment is not legally available at all. In *Tupper*, the CMAC was not addressing the question of what punishments were available to be imposed upon a former member of the CF. Rather, the court was dealing with the question of whether the specific punishments imposed upon Tupper continued to be efficacious given the change in Tupper's circumstances.

[19] In the result, I conclude that *Tupper* is not authority for the wide proposition advanced by counsel for the offender in this case. I hold that reduction in rank is a legally available sentencing option in this case notwithstanding the release by retirement of the offender since the date of the offence. I turn, therefore, to the question of whether reduction in rank is appropriate in this case.

[20] In support of a sentence that includes the punishment of reduction in rank, the prosecutor argues that the facts of this offence disclose a serious breach of trust on the part of Colonel Lewis. While it is no doubt true that Commodore Truelove relied upon his subordinates, including Colonel Lewis, to provide him with accurate and trustworthy information when it was sought, I do not consider that the relationship between the two of them was characterized by the same kind of trust of which section 718.2(*a*)(*iii*) of the *Criminal Code* speaks. The same may be said for the relationship between the offender and Major Myers. Nevertheless, I agree with the prosecutor that in this case the offender failed to live up to the high standards required of all those in the position of a commanding officer set out in the guidance given by the Chief of Defence Staff. As a commanding officer the offender had a special responsibility to model the highest standards of integrity and probity. His actions would justify a loss of confidence in his trustworthiness on the part of his superiors, his subordinates, and those with whom he worked.

[21] I have stated in previous cases that the rank of a member of the Canadian Forces is a visible sign of the trust and confidence placed in the member by the Canadian Forces. The loss of rank may be an especially appropriate punishment to sanction an offence that occasions a loss of trust or confidence where there is a link between the rank of the offender and the commission of the offence; for example, where a superior abuses the authority of his or her rank to mistreat a subordinate. In this case the offender appears to have used the special access that he had to the personal file of one of his subordinates in order to falsify a document in an attempt to cover up the lie he had already told his superior.

[22] Where rank is lost it can also be regained once the offender has demonstrated to his or her chain of command that they are again worthy of the trust and confidence of which rank is a symbol. In this way, the punishment of reduction in rank may further the sentencing goals of rehabilitation and of developing a sense of responsibility in an offender by encouraging an offender so sentenced to work at the restoration of trust so as to merit promotion back to the rank he or she has lost. Reduction in rank can also serve other sentencing purposes and goals.

[23] The offender testified during the sentence hearing. I accept his evidence that he was under considerable stress at the time of the offence arising principally from serious health concerns for himself and other members of his family, as well as a difficult work environment. He testified that his position at the college would be in jeopardy if he had sought a medical exemption from completing the EXPRES test. I am unable to follow his reasoning on this point, and on all the evidence I do not consider that a satisfactory explanation has been given for the offender lying to his military superior and to other

persons. But I do not accept the submission of the prosecutor that the offence was committed in order to further the offender's career prospects.

[24] The offender has had a long and distinguished career in the Canadian Forces. Within a couple of months of committing the offence he decided to retire, and was released in the summer of 2011. He continues to maintain a professional association with RMC, and continues to be highly regarded by his engineering colleagues in the academic world. Once his offence was discovered he cooperated with the investigators. He has no record of previous offences, and I am satisfied that his plea of guilty is a genuine demonstration of remorse for his conduct.

[25] On all the circumstances of the case relating both to the offence and to the offender, I am not persuaded that the punishment of reduction in rank is called for. Since the offender is now retired I consider that such a punishment in this case would not have the rehabilitative effect I have already referred to. In my view the primary sentencing objective in this case is deterrence, both general and specific, and in my view those objectives are best met in this case by the imposition of a substantial fine.

FOR THESE REASONS, THE COURT

[26] **FINDS** you guilty of the charge under section 125 of the *National Defence Act* for with intent to deceive altered a document made for a departmental purpose, and

[27] **SENTENCES** you to a fine in the amount of $5,000.

Counsel:

Lieutenant-Colonel M. Trudel, Canadian Military Prosecution Service
Counsel for Her Majesty, the Queen

Lieutenant-Commander B. Walden, Directorate of Defence Counsel Services
Counsel for Lieutenant-Colonel Lewis