



COURT MARTIAL

Citation: *R v Yurczyszyn*, 2014 CM 2005

Date: 20140410

Docket: 201364

Standing Court Martial

Canadian Forces Base Wainwright
Wainwright, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Major D. Yurczyszyn, Offender

Before: Colonel M.R. Gibson, 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Code*, information that could disclose the identity of the person described in the judgement as the complainant shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR SENTENCE

(Orally)

[1] Major Yurczyszyn, you have pleaded guilty to the second charge on the charge sheet of drunkenness pursuant to section 97 of the *National Defence Act*, and have been found guilty of the first charge of sexual assault pursuant to section 271 of the *Criminal Code* following a trial. Accordingly, the court now finds you guilty of both charges on the charge sheet.

[2] It now falls to the court to determine a fit and appropriate sentence on the facts as they have emerged in evidence.

[3] The two charges in this case both arise from the events of the evening of 11 November 2012. The facts relating to section 271 sexual assault charge were detailed in the court's reasons for decision on that charge. In brief, the court found that Major Yurczyszyn sexually assaulted a civilian woman, Y.J., at a party held at the house of W.D., by touching her left breast without her consent.

[4] The statement of circumstances agreed by the prosecution and defence in respect of the section 97 Drunkenness charge was entered into evidence as Exhibit 4. It provides as follows:

"Statement of Circumstances

1. At all material times, Major Yurczyszyn was a member of the Regular Force of the Canadian Armed Forces. He was posted to Canadian Forces Base/Area Support Unit Wainwright in Wainwright, Alberta, as the Commanding Officer of that unit.

2. On 11 November 2012, public Remembrance Day services and parades were held in the Wainwright area. As is common military custom, Major Yurczyszyn, attended those events that morning and represented Base Wainwright as its commander. Following the dismissal of those services and parades, Major Yurczyszyn and many other service personnel attended the local Royal Canadian Legion for an informal open house and reception.

3. At some point in the afternoon, Major Yurczyszyn moved to the Dog & Suds Pub, a local bowling alley and drinking establishment in Wainwright. There, he voluntarily consumed alcohol. He remained in uniform throughout this period.

4. On the evening of 11 November 2012, W.D. organized an impromptu gathering at his home in the Town of Wainwright, Alberta. This gathering consisted of various military officers, all from Base Wainwright, as well as civilian guests. Also in attendance was W.D.'s civilian girlfriend, Y.J. This gathering began around 1800 hours. Major Yurczyszyn was not initially invited, but it was suggested that he should be and he was contacted via BlackBerry.

5. L.K., an officer at the party who was sober and could drive, was dispatched to pick-up Major Yurczyszyn. Major Yurczyszyn was intoxicated and required a ride. Major Yurczyszyn arrived at W.D.'s house at approximately 2100 hours.

6. On his arrival, Major Yurczyszyn was noted by W.D., K.H. and Y.J. as being drunk. He had difficulty standing, slurred his words, and was red-faced. Additionally, he arrived still wearing his service uniform. He declined the opportunity to change into civilian attire. Major Yurczyszyn's tunic was unbuttoned, his shirt tail was hanging out and he was generally dishevelled.

7. On arrival, Major Yurczyszyn sought out and was provided with an alcoholic beverage. He was noted to be spilling his drink as he socialized and he was unsteady on his feet. He drank for the duration of his stay, including champagne while in the kitchen with W.D., K.H. and Y.J. He remained at W.D.'s residence until approximately 2300 hours.

8. Major Yurczyszyn departed the party when K.H. stated words to the effect of "Okay, your night is over."

9. K.H. and Major Yurczyszyn agreed to leave together. She assisted him with his boots and coat, as and they left the party together. They travelled a short distance to K.H.'s residence.

10. While at K.H.'s residence, the two majors talked and played a game of cribbage. Eventually K.H. drove Major Yurczyszyn home.

11. Major Yurczyszyn was intoxicated on the evening of 11 November 2012.

12. Throughout the evening, Major Yurczyszyn's consumption of alcohol was voluntary. He drank alcohol at the Dog & Suds, at W.D.'s residence and at K.H.'s residence.

13. The following day, Major Yurczyszyn sent an e-mail to K.H. to apologize for his behaviour the night before."

[5] In addition, the prosecution also called K.H. to give evidence in the sentencing phase of the trial, both with regard to additional facts concerning the drunkenness charge, and to indicate the effect that the commission of the offence has had on her.

[6] She stated that, after the incident involving Major Yurczyszyn touching Y.J., she had a discussion at W.D.'s house with Major Yurczyszyn about his wife, who worked at the base medical clinic as a CDU clerk. She told him not to attempt to interfere in the operation of the clinic. At one point he asked her, "do you shave down there," indicating her pelvic region. She told him that the question was inappropriate, and declined to answer. She indicated that Major Yurczyszyn appeared to be obviously drunk at this point. She indicated that she then assisted him to get dressed, and offered to drive him home, as she did not want him to walk home in the extremely cold weather (-30) then prevailing in his inebriated state. He declined to go to his house, and suggested that the

local Tim Horton's would be closed, so they went to K.H.'s house instead for a further discussion. K.H. offered him some non-alcoholic beverages, but Major Yurczyszyn then helped himself to a Grand Marnier, and K.H. had a small scotch. Major Yurczyszyn made repeated requests for a kiss and asked to have sex with her, which she repeatedly declined. They played a game of cribbage, with a suggested bet that if she won, she would get a designated parking spot at the Officers Mess. Major Yurczyszyn suggested that if he won, she would give him a kiss, but she declined to agree. Major Yurczyszyn then again propositioned her for sex, which she declined again. When he asked if she thought he was good looking, she said that he was not her type. She got him his coat and offered to drive him home. He grabbed her arms and kissed her, inserting his tongue in her mouth. She rebuffed him, saying that the kiss tasted horrible, like cigarettes. She pushed him outside. She then looked outside and observed him slipping and sliding on his shoes. Concerned that he would not make it home safely in the cold weather in his intoxicated state, she told him that she would give him a drive to his house a short distance away. In the car, he grabbed her crotch. She told him to "get the fuck out". He laughed and got out of the car, slamming the door. She then drove away.

[7] K.H. indicated that in hindsight, she wished she had not invited Major Yurczyszyn to her home, particularly as her husband was away on deployment. She felt that he had taken advantage of her friendliness and desire to assist him, using it as an opportunity to sexually proposition her. She indicated that the incident has created anxiety for her, that she has difficulty sleeping as a result, and that she is currently on medication and receiving psychological counselling on an ongoing basis as a result of the incident. She felt isolated on the base, and left her command appointment approximately six weeks early.

[8] The defence contests many aspects of K.H.'s version of events after she and Major Yurczyszyn left the party at W.D.'s house, and has urged the court to find her evidence not credible.

[9] I find that K.H. was a credible witness concerning these events, and I accept her evidence concerning what transpired at W.D.'s house, in her residence and in her car. The inconsistencies in her evidence pointed to by the defence are either minor or entirely collateral to the relevant events of the evening in question.

[10] Pursuant to *QR&O* 112.53, where there is a dispute with respect to any fact that is relevant to the determination of sentence, the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence, and the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact. I find that the aggravating facts contained in K.H.'s evidence concerning Major Yurczyszyn's conduct after the two left the party, have been made out to this requisite standard.

[11] Counsel for the prosecution and defence are far apart on their recommendations as to sentence. The prosecution submits that an appropriate sentence would be one of

reduction in rank to the rank of lieutenant. The defence submits that the appropriate sentence would rather be a severe reprimand together with a fine in the range of \$5,000 to \$8,000. Defence counsel submits that the punishment of reduction in rank is not appropriate on these facts, and suggests that if the court considers the quantum of the fine recommended to be inadequate, that it impose a larger fine rather than moving to the punishment of reduction in rank, which is higher in the scale of punishments set out at section 139 of the *National Defence Act*.

[12] The fundamental purposes of sentencing by service tribunals in the military justice system, of which courts martial are one type, are: to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and to contribute to respect for the law and the maintenance of a just, peaceful and safe society. In short, to promote operational effectiveness, and to do justice.

[13] The fundamental purposes are achieved by the imposition of just sanctions that have one or more of the following objectives: to promote a habit of obedience to lawful commands and orders; to maintain public trust in the Canadian Forces as a disciplined armed force; to denounce unlawful conduct; to deter offenders and other persons from committing offences; to assist in rehabilitating offenders; to assist in reintegrating offenders into military service; to separate offenders, if necessary, from other officers or non-commissioned members or from society generally; to provide reparations for harm done to victims or to the community; and to promote a sense of responsibility in offenders and an acknowledgement of the harm done to victims and to the community.

[14] The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[15] Other sentencing principles include: a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances; a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; an offender should not be deprived of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances; a sentence should be the least severe sentence required to maintain discipline, efficiency and morale; and any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

[16] In the case before the court today, I must determine if the sentencing purposes and objectives would best be served by deterrence, denunciation, rehabilitation, or a combination of these factors.

[17] Offences such as the section 97 offence of drunkenness in this case are aimed to protect and preserve the core values of military discipline. The punishments imposed should emphasize the objectives of general and specific deterrence, as well as denunciation of the unlawful conduct. The sentence given by the court should also be tailored to

meet the objectives of rehabilitating offenders and assisting their reintegration into military service, where appropriate.

[18] The court must impose a sentence that is of the minimum severity necessary to maintain discipline, efficiency and morale. Discipline is that quality that every Canadian Forces member must have that allows him or her to put the interests of Canada and of the Canadian Forces before personal interests. This is necessary because members of the Canadian Forces must promptly and willingly obey lawful orders that may potentially have very significant personal consequences, up to injury or even death. Discipline is described as a quality because ultimately, although it is something which is developed and encouraged by the Canadian Forces through instruction, training and practice, it is something that must be internalized, as it is one of the fundamental prerequisites to operational effectiveness in any armed force. One of the most important elements of discipline, particularly as members become more senior in rank and responsibility, is self-discipline. And this is the characteristic that the actions of Major Yurczyszyn indicate he lacks.

[19] The court considers that the aggravating factors in this case are the following:

- a. first, the rank and position of Major Yurczyszyn. At the time of the commission of these offences Major Yurczyszyn was a senior officer and occupied the high-profile position of Base Commander at Canadian Forces Base Wainwright, as well as Commanding Officer of the Area Support Unit, with some 550 persons under his command;
- b. second, that his conduct, in the words of the section 97 offence provision in the *National Defence Act*, was the exemplification of "likely to bring discredit on Her Majesty's service" given his rank and position, and must be regarded as a subjectively grave instance of drunkenness within the meaning of that offence in the *National Defence Act*;
- c. third, that he was in uniform at the time of the commission of the offences, adding to the perceptual and reputational damage to the Canadian Forces caused by his conduct;
- d. fourth, that he engaged in his drunken conduct in front of junior officers who were his subordinates, and civilian members of the community;
- e. fifth, that he sexually assaulted a young civilian woman, and engaged in conduct with a peer, K.H., that, while not charged as a sexual assault, clearly violated her sexual integrity; and
- f. sixth, the continuing significant adverse impact upon K.H. caused by his conduct.

[20] The mitigating factors in this case include the following:

- a. first and foremost, that Major Yurczyszyn accepted responsibility for the section 97 drunkenness offence by entering a guilty plea, which is always an important mitigating factor;
- b. that Major Yurczyszyn has no entries on his conduct sheet, other than the positive one of having received a Chief of the Defence Staff Commendation for his service in Afghanistan in 2008-2009;
- c. that although the offence of sexual assault is an objectively serious one, punishable by imprisonment not exceeding 10 years, on the facts in this case, that is, touching Y.J.'s breasts without her consent, the subjective gravity of the offence committed was toward the more minor end of the spectrum; and
- d. the assessment in the psychological assessment of Major Yurczyszyn by Dr. Monkhouse in evidence as Exhibit 9 that he is a low risk for further sexual offending.

[21] In determining an appropriate sentence in this case, I have carefully canvassed all of the sentencing precedent cases provided by the prosecution and defence.

[22] Major Yurczyszyn has, through his conduct, betrayed the trust placed in him by virtue of his rank and appointment as Base Commander. With greater authority, comes greater responsibility. To whom much is given, much is expected. As confirmed by the Court Martial Appeal Court in the case of *Leading Seaman Reid and Leading Seaman Sinclair*, 2010 CMAC 4 at paragraph 39, the punishment of reduction in rank is well suited to signifying, more effectively than any fine or reprimand that can be imposed, the Canadian Forces' loss of trust in the offending member. Its effect is both to express the severe disapprobation of the offender's conduct, as well as to lessen his or her ability to exercise command over other Canadian Forces members, unless and until he or she can demonstrate that they are once again worthy of holding that rank through demonstrated performance, reliability and integrity.

[23] For these reasons, I consider the punishment of reduction in rank to be the minimum necessary to maintain discipline, efficiency and morale in this case.

FOR THESE REASONS, THE COURT:

[24] **FINDS** you guilty of both charges on the charge sheet; and,

[25] **SENTENCES** you to reduction in rank from major to captain.

Counsel:

Lieutenant-Commander S. Torani, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Major S. Collins, Directorate of Defence Counsel Services
Counsel for Major D. Yurczyszyn.