COURT MARTIAL

Citation: *R v Cook*, 2013 CM 3005

Date: 20130130
Docket: 201226

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Petty Officer 2nd Class A.S. Cook, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Petty Officer 2nd Class Cook, having accepted and recorded a plea of guilty in respect of the fourth charge on the charge sheet, the court now finds you guilty of this charge. Considering that the prosecution withdrew the first, second and third charges on the charge sheet, the court is left without any other charge to deal with.

[2] It is now my duty as the military judge who is presiding at this Standing Court Martial to determine the sentence.

[3] The military justice system constitutes the ultimate means to enforce discipline in the Canadian Forces, which is a fundamental element of the military activity. The purpose of this system is to prevent misconduct or, in a more positive way, see the promotion of good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusting and reliable manner, successful missions. It also ensures that the 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.

[4] It has long been recognized that the purpose of a separate system of military justice or tribunal is to allow the armed forces to deal with matters that pertain to the respect of the Code of Service Discipline and the maintenance of efficiency and the morale among the Canadian Forces, as established in *R v Généreux* [1992] 1 SCR 259 at

293. That being said, the punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances.

[5] Here, in this case, the prosecutor and the offender's defence counsel made a joint submission on sentence to be imposed by the court. They recommended that this court sentence you to a reprimand and a fine in the amount of $1,500 in order to meet justice requirements. Although this court is not bound by this joint recommendation, it is generally accepted that the sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. "Cogent reasons" mean where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute, or be contrary to the public interest as established in *R v Taylor* 2008 CMAC 1 at paragraph 21.

[6] As the Supreme Court of Canada recognized in *Généreux*, in order "to maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently." It emphasized that in the particular context of military justice, "breaches 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 the case. In other words, any sentence imposed by a court 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.

[7] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of discipline by imposing sanctions 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 offence;

(d) to separate offenders from society where necessary; and,

(e) to rehabilitate and reform offenders.

[8] When imposing sentence, a military court must also take into consideration the following principles:

(a) a sentence must be proportionate to the gravity of the offence;

(b) a sentence must be proportionate to the responsibility and previous character of the offender;

(c) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(d) an offender should not be deprived of liberty, if applicable in the circumstances, if less restrictive sanctions may be appropriate in the circumstances. In short, the court should impose a sentence of imprisonment or detention only as a last resort as it was established by the Court Martial Appeal Court and the Supreme Court of Canada decisions; and,

(e) lastly, all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[9] I came to the conclusion that in the particular circumstances of this case, sentencing should place the focus on the objectives of denunciation and general and specific deterrence.

[10] Here the court is dealing with a military offence of an act to the prejudice of good order and discipline for having dove without a current Canadian Forces (CF) physical fit test qualification. It appears from the circumstances of this case put before this court that between 6th September, 2006, and 4 October 2009, PO2 Cook dove at different locations without having a current Canadian Forces diver's physical fitness test qualification as required in the Canadian Forces Diving Manual. Basically, if I understand clearly the circumstances of this case, you failed to do your CF EXPRES test and that in order to dive you had to do it, and you did not do it for a period of three years.

[11] I have to highlight that this type of offence is directly related to some Canadian Forces members' ethical obligations such as integrity and honesty. For a non commissioned member, as it is for an officer, being reliable at all times is more than essential for the accomplishment of any task or mission in an armed force, whatever is the function or the role you have to perform, especially when you dive.

[12] In arriving at what the court considers a fair and appropriate sentence, the court has considered the following mitigating and aggravating factors:

(a) The court considers as aggravating the objective seriousness of the offence. The offence you were charged with was laid in accordance with section 129 of the *National Defence Act*, which is punishable by dismissal with disgrace from Her Majesty's service or to less punishment.

(b) Secondly, the subjective seriousness of the offence. And for this I considered two things:

(i) First, the length of time the offence took place. It appears to me that you had to proceed with your CF EXPRES test at least once a year and you failed to do so. By extending this to three years, you demonstrated clearly that it was not your intent to proceed in accordance with the regulation. Especially in your trade, it is something that is very important: to be fit for diving. I understand that we are not talking about a medical exam here, but if it is in the manual that you have to pass the CF EXPRES test just to make sure that, physically speaking, you are fit, this is something that has to be done; and you failed to do this for a long period of time.

(ii) The second aggravating factor is your experience. Between 2006 and 2009, considering your rank, your qualification as a diver in the Canadian Forces, and your position, you should have known better. You knew the consequences. If you put yourself in the position—and I just want you to think about this—where if one of your own divers came to you and said that I don't need to do it, how would you respond to that as a leader: "I don't need to do my CF EXPRES test." Probably you would have answered that this is a requirement. You have to be an example for those divers who are looking to you as a leader, and I'm pretty sure that you are aware of that, so I don't have to expand a lot on this. But, for me, it's two aggravating factors from a subjective perspective.

[13] There are also mitigating factors that I considered:

(a) First, there is your guilty plea. Through the facts presented to this court, the court must consider your guilty plea as a clear, genuine sign of remorse and that you are very sincere in your pursuit of staying a valued asset to the Canadian Forces, and it also disclosed the fact that you are taking full responsibility for what you did, and I think it reflects that very well. A guilty plea—counsel didn't expand a lot on this factor, but I can tell you that it has an impact as a mitigating factor. You are taking full responsibility; you recognize what you did as something wrong.

(b) There is also the fact that there is no annotation on your conduct sheet. There is no indication of the commission of any similar offence, military offence or criminal offence, in relation or not to what happened.

(c) There is also the fact that you had to face this court martial, and I am sure it has already had some deterrent effect on you, but also on others. Basically, you appear here in front of some of your peers and some of the people that, maybe, are involved in the chain of command. So facing this court martial clearly passes the message, not just to you but to others, that something like this cannot be accepted in the Canadian Forces.

(d) I have to consider the fact that has not been put to me, that there was no consequence to your actions. Meaning by this that no incident happened during that period, and the fact that you failed to do your EXPRES test was not in relation to any bad result or bad consequences. So I have to consider that as mitigating factor.

(e) Also, the court accepts the suggestion made by counsel: this punishment will remain on your conduct sheet unless you get a pardon for the criminal record you are getting today. The realty is that your conviction will carry out a consequence that is often overlooked, which is that you will now have a criminal record, and it is not insignificant.

(f) Lastly, I have to consider the delay. The prosecutor reassured me, and I'm comfortable with that, that in balancing all those factors in order to suggest to the court a fit sentence, an appropriate sentence, he considered the delay to proceed with this case. We are talking about something that occurred between 2006 and 2009 and for which you were charged in May 2011. Because he considered that, I did not ask a lot of questions, but my understanding is that the chain of command did not proceed carefully with the file. It ended up that, at least, it added a year to proceed with this. The other year that it took to come to this court martial is more in relation with counsel to proceed, to find a date, to deal with this matter. It took a long time too. I am not here to blame anybody but now we are talking about something that happened between 2006 and 2009 and we are in 2013. I think you had a lot of time to consider what happened and probably to go on with some of your things. I don't know if anybody put your career on hold for that time, but, for sure, as a matter of fact, when you are ready to plead guilty, you also want to turn the page, and this is

> what you are doing today. And because it took a long time to bring it to me, I have to consider that as a mitigating factor.

[14] In consequence, the court will accept the joint submission made by counsel to sentence you to a reprimand and a fine in amount of $1,500, considering that it is not contrary to the public interest and will not bring the administration of justice into disrepute.

FOR THESE REASONS, THE COURT:

[15] **FINDS** you guilty of fourth charge on the charge sheet for an offence under paragraph 129 of the *National Defence Act*.

[16] **SENTENCES** you to a reprimand and fine in the amount of $1,500 payable immediately.

Counsel:

Captain K. Lacharité, Canadian Military Prosecutions Service
Counsel for Her Majesty the Queen

Lieutenant-Commander B.G. Walden, Directorate of Defence Counsel Services
Counsel for Petty Officer 2nd Class Cook