COURT MARTIAL

Citation: *R v Lunney*, 2012 CM 2012

Date: 20120913
Docket: 201225

General Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Major C.D. Lunney, Offender

Before: Commander P.J. Lamont, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Major Lunney, having accepted and recorded your plea of guilty to the third charge in the charge sheet, a charge that you negligently performed a military duty imposed upon you, and having considered the alleged and admitted facts, this court now finds you guilty of the third 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 Statement of Circumstances, Exhibit 6, and the testimony and other materials submitted during the course of the 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 degree 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.

[5] 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 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 an appropriate blending of these goals, tailored to the particular circumstances of the case.

[6] As I told you when you tendered your plea of guilty, section 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.

[7] 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.

[8] The facts and circumstances surrounding the commission of the offence are as straight forward and uncomplicated as they are tragic. They are set out in detail in Exhibit 6, the Statement of Circumstances. In summary, as the Officer Commanding Stabilisation Company A, part of the Kandahar Provincial Reconstruction Team at Camp Nathan Smith in Kandahar, Afghanistan, Major Lunney was in charge of four platoons of soldiers. On his orders, the four platoon commanders conducted range practices for their platoons on a monthly basis. On these occasions, each platoon commander acted as the Officer in Charge Practice, or OIC Practice.

[9] Approximately a week prior to 12 February 2010, the date alleged in the charge, the commander of 2 Platoon sought and was granted permission by Major Lunney to fire a DCDW C19 command detonated, anti-personnel mine, often referred to as a "Claymore", on a platoon range near Kan Kala, northeast of Kandahar.

[10] On the date alleged, Major Lunney was present for the range practice. When 2 Platoon commenced the DCDW C19 range, fragments from a DCDW C19 struck several members of 2 Platoon, killing Corporal Joshua Baker and injuring four other members of the platoon. A publication, issued on the authority of the Chief of the Land Staff and readily available to users of the computerized Defence Information Network, including Major Lunney, called the "Operational Training – Training Safety", states among its principles:

> "Weapons and weapons systems shall NEVER be placed in charge of personnel who are not qualified on the weapon or the weapon system except for the purpose of safeguard, transport or storage."

[11] The publication goes on to state the qualifications to be appointed an OIC Practice for a specific range, stating:

> "To be qualified for appointment as an OIC Practice ... a person must:
>
> a. be qualified on the weapon or weapons systems being used in the exercise by virtue of either a formal CF course or a combination of unit training and experience that meets with the approval of the CO of the unit."

And the appointment is to be notified in orders.

[12] The commander 2 Platoon was neither qualified nor experienced with the DCDW C19. He had not been appointed as an OIC Practice and could not have been so appointed by Major Lunney. Major Lunney mistakenly believed that the commander 2 Platoon was qualified to act as OIC Practice for the DCDW C19 range because of his position and rank; however, Major Lunney did not verify what qualifications were necessary by reference to the training safety publication, nor did he verify the qualifications of his subordinate, the commander 2 Platoon.

[13] On these facts, counsel before me jointly recommend a sentence of reduction in rank to the rank of captain, and a severe reprimand. The sentence to be pronounced is, of course, a matter for the court but where, as in this case, both parties agree upon a recommended disposition, that recommendation carries considerable weight with the court. The courts of appeal across Canada, including the Court Martial Appeal Court in the case of *Private Chadwick Taylor*, 2008 CMAC 1, have held that the joint submission of

counsel as to sentence should be accepted by the court unless the recommended sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[14] I have considered the aggravating and mitigating circumstances referred to by both counsel. I attach significance to the early plea of guilty tendered by Major Lunney and I accept, without reservation, the sincerity of his apology offered in the course of his evidence to those persons, both family members and colleagues, who continue to suffer the loss of a fine Canadian solider and to those who were injured. It appears that the offender properly took charge of the scene, rendered as much assistance as he could, and cooperated fully with the investigators, including sealing off the scene, obtaining statements and providing a statement himself to the investigators.

[15] The offender has had a distinguished record of service since he was commissioned in August of 1996. Several letters of reference testify to the high esteem in which the offender is held by both current and former senior officers which whom he has been associated. In short, specific deterrence is not a major concern in arriving at a sentence in this case.

[16] I am mindful as well of the stressful conditions in the Afghanistan theatre at the time of this offence. With the ever present threat of sudden and violent death or injury in a theatre of active war operations, it is the scrupulous regard for, and adherence to, policy instructions that are designed to minimize harm, and that are frequently themselves the product of hard experience, that is but one of the ways of minimizing those threats.

[17] As part of the sentence today, the offender will lose his current rank. As I have observed elsewhere, where rank can be lost, it can also be regained. Without doubt, Major Lunney, you earned the rank you wore on the date of this offence, and should you continue to serve in the Canadian Forces, I am confident that, although you lose it today, you will have ample opportunity to earn it back.

[18] As required by section 147.1 of *National Defence Act*, I have considered whether it is desirable, in the interests of the safety of the offender or of any other person, to make an order prohibiting the possession of firearms or other weapons or explosives. I do not consider such an order desirable in this case.

[19] Considering all the circumstances of this case, relating both to the offence and to the offender, I cannot say that the disposition proposed jointly by counsel would either bring the administration of justice into disrepute or is otherwise contrary to the public interest and I therefore accept the joint submission.

FOR THESE REASONS, THE COURT:

[18] **FINDS** you guilty of the third charge, for an offence under section 124 of the *National Defence Act*.

[19] **SENTENCES** you to reduction in rank to the rank of captain and a severe reprimand.

Counsel:

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