COURT MARTIAL

Citation: *R v Heideman*, 2013 CM 3004

Date: 20130131
Docket: 201310

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Trooper R.P. Heideman, Offender

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

REASONS FOR SENTENCE

Orally

[1] Private Heideman, having accepted and recorded a plea of guilty in respect of the first charge, not to the charge as it is in the charge sheet, but to a less serious offence prescribed at section 133 of the *National Defence Act*, which is absented himself without leave, and to the second, third, sixth and seventh charge on the charge sheet, the court now finds you guilty of these charges. The prosecutor having withdrawn the fourth and the fifth charge, then the court is left with nothing else to deal with. It is now my duty as the military judge who is presiding at this Standing Court Martial to determine the sentence.

[2] 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, to see the promotion of good conduct. It is through discipline than an armed force ensures that its members will accomplish, in a trusting and reliable manner, successful missions. It 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.

[3] It has been long 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 has been established in *R v Généreux* [1992] 1 SCR 259 at page 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.

[4] 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 dismissal from Her Majesty's service. 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 mentioned in the Court Martial Appeal Court decision of *R v Taylor* [2008] CMAC 1, at paragraph 21.

[5] Imposing a sentence is one of the most difficult tasks for a judge. 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.

[6] 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 offences;

d. to separate offenders from society where necessary; and

e. to rehabilitate and reform offenders.

[7] When imposing sentences, 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 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.

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

[9] Here, the court is dealing with three offences for being absent without leave, contrary to section 90 of the *National Defence Act*, involving three different periods of time: the first one being at the end of September, beginning of October; then at the end of the month of October; and finally for the very end of the month of October until recently, mid-January 2013. Also, the court is dealing with two offences for failing to comply with a condition imposed under Division 3 by a custody review officer: one on 23 October 2012, and the other on 30 October 2012.

[10] Basically, when you were asked to justify the fact that you went to a car appointment, you made the decision to not show up for the first time. You came back on your own, you were arrested, and conditions were imposed at that time; however, you failed to comply with these conditions and, also, you failed to attend a medical appointment for a follow-up. Then you were absent without leave for a second time. You were then arrested again, brought before the custody review officer who imposed again conditions, and the day after, you decided not to report again and not to comply with some of the conditions that were imposed on you. Finally, you were absent again without leave and it took two and a half months, in accordance with an arrest warrant, for the military police to locate you and it was in a place where you were basically working for some time. Then you were arrested, transferred to Petawawa and then you had the opportunity to go before the custody review officer again, who decided not to release you and you had a custody review hearing before a judge who decided not to release you.

[11] You have to keep in your mind the fact that AWOL and failing to comply with a condition imposed further to your arrest and detention are both serious offences, per se, as defined in the *National Defence Act* and they involve Canadian Forces principles such as obey and support lawful authority, and rely on Canadian Forces ethical obligations such as integrity, loyalty and responsibility.

[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 offences. The offences you were charged with were laid in accordance with section 90 and 101.1 of the *National Defence Act*. These offences are punishable by imprisonment for less than three years or to less punishment;

b. Secondly, the subjective seriousness of the offences and, for the court, there are three things:

(i) First, you gave up your responsibilities as a soldier for an unknown reason; nothing was put before me as evidence. You decided that you will pass yourself before anything else without paying attention to the consequences of your decision. You let your unit deal with the impact of your absence and I haven't heard any regret about this. You made it clear that you were unreliable. Don't forget that you were arrested three times and released twice, with conditions. Despite those facts, you decided to go away a third time without letting anybody know about what you were doing. Basically it was, as mentioned by the prosecutor, loud and clear that you didn't intend to come back, and it is an aggravating factor;

(ii) There is also the length of your absence. It disclosed a lack of care for the people in your organization and a clear, reckless attitude. You were absent for a short period of time the first time, a longer period of time the second time, a really long period of time the third time, with the clear message that you didn't want to come back in the Canadian Forces. This is an aggravating circumstance;

(iii) Also, the third aspect, as a matter of an aggravating factor, is the repetition of the offence. You failed twice to comply with conditions and you were absent a short period of time. Consider this: in four months you were absent without leave three times. So it was repetitive. I would be inclined to think that it was, in some

way, premeditated in the sense that it was planned, and it's an aggravating factor, too.

[13] The court considers that the following circumstances mitigate the sentence:

a. First, there is your guilty plea. Today, through the facts presented to this court, you clearly, through your guilty plea, announce a clear, genuine sign of remorse and also disclose to the court that you are sincere in your pursuit of staying a valued asset to the Canadian society. Basically, you are taking full responsibility today for what you did;

b. I have to consider also your age, 24 years old, and your potential as a member of the Canadian society. You still have many years ahead to contribute positively;

c. 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;

e. I have also considered the time you spent in detention. Those 13 days had an impact on the objective and reflects the objective of denunciation and also reflects the idea of general deterrence to others;

f. I would like to add that if 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. Also, you are released from the Canadian Forces and you have a conduct sheet; you're getting today a criminal record. It carries out a consequence that is often overlooked, because people will never notice that, basically, but you have a criminal record. Think about that.

[14] In consequence, the court will accept the joint submission made by counsel to sentence you to dismissal from Her Majesty's service, considering that is it not contrary to the public interest and will not bring the administration of justice into disrepute.

FOR THESE REASONS, THE COURT:

[15] **FINDS y**ou guilty of the first, second, third, sixth and seventh charges. In respect to the first charge, the court finds you guilty of the less serious offence prescribed at section 133 of the *National Defence Act*, of absented himself without leave.

[16] **SENTENCES** you to dismissal from Her Majesty's service.

Counsel:

Major J.E. Carrier, Canadian Forces Prosecution Services
Counsel for Her Majesty the Queen

Major C.E. Thomas, Directorate of Defence Counsel Services
Counsel for Trooper R.P. Heideman