COURT MARTIAL

Citation: *R v Lyons*, 2014 CM 4005

Date: 20140610
Docket: 201413

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Private J.S. Lyons, Offender

- and -

Her Majesty the Queen

Before: Commander J.B.M. Pelletier, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Private Lyons, having accepted and recorded a plea of guilty in respect of the second and the third charges, the only remaining charges on the charge sheet, the court now finds you guilty of those two charges under section 130 of the *National Defence Act* for possession of marihauna contrary to section 4(1) of the *Controlled Drugs and Substances Act*.

[2] It is now my duty as the military judge presiding at this Standing Court Martial to determine the sentence. 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 relevant to this case as disclosed in the evidence and the 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 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 the promotion of good conduct by allowing the proper sanction of misconduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusting and reliable manner, successful missions. In doing so, it also ensures that the public interest in promoting respect for the laws of Canada is served by the punishment of persons subject to the Code of Service Discipline.

[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 amongst the Canadian Forces.

[5] As the Supreme Court of Canada recognized in *R v Généreux*, [1992] 1 SCR 259, at page 293:

> ... To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently.

At the same page, 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.

[6] That is the case with drug offences as decided in 1986 by the Court Martial Appeal Court in *R v MacEachern*, (1986) 24 C.C.C. (3d) 439, and in numerous other appeal cases, mainly in relation with drug trafficking. Courts martial have also accepted the notion that a more severe punishment may be required in the military context for drug offences including in the case of *R v Benedetti*, 2013 CM 2009, brought to my attention by counsel, where Judge Lamont stated at paragraph 10 that he considers that:

> ... the violation of the drug laws will almost always be punished more severely [in the Canadian Forces] than the same offences committed by civilians in a civilian context.

I endorse that statement.

[7] That being said, punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances. It also goes directly to the duty imposed to the court to impose a sentence commensurate to the gravity of the offence and the previous character of the offender, as stated in the Queen's Regulations and Orders. 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.

[8] 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.

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

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

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

(c) the 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; 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.

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

[11] Here the court is dealing with an offence of possession of cannabis (marihuana), a breach of Canadian law constituting an involvement with drugs subject to the Canadian Forces Drug Control Program found at Chapter 20 of the Queen's Regulations and Orders. In that sense, it's a breach of an important tenet of service in the Canadian Forces.

[12] Before the court is a 24 year old offender, who joined the Canadian Armed Forces on 8 July 2009. He served as an infantryman with the Royal Canadian Regiment following QL3, from April 2010 until September 2012 when he became a firefighter. He deployed with the Royal Canadian Regiment Battle Group in Afghanistan from September to December 2010. He is currently serving at Base Accommodation in

Petawawa and has no dependants. He has pleaded guilty to two charges of possession of marihauna.

[13] The Statement of Circumstances was read by the prosecutor and accepted as conclusive evidence by Private Lyons. The circumstances of the first offence are as follows:

(a) In the early hours of 23 June 2013, members of the military police were conducting a vehicle check at the North Gate at Canadian Forces Base Borden. While conducting a search of the interior of a motor vehicle driven by Private Lyons, a military policeman observed paraphernalia associated with drug use in the centre console of the vehicle. The remnants of what the police believed to be burnt marihauna cigarette was observed inside a plastic bottle; and

(b) Private Lyons was arrested for possession of a controlled substance. The substance seized weighed 0.3 grams and was later analyzed to be cannabis (marihauna).

[14] The second offence occurred at CFB Petawawa in the morning of 20 October 2013:

(a) Private Lyons was observed driving his vehicle and exiting from a roadway leading to the base campground by a member of the military police. This observation aroused suspicion as the campground was closed for the season. The military policeman stopped the motor vehicle and spoke to Private Lyons, who was the sole occupant of the vehicle;

(b) He detected the smell of raw marihauna originating from the interior of the vehicle and placed Private Lyons under investigative detention. Having been provided with his rights to counsel and caution, he stated that there was some marihauna residue in the vehicle. As a result of that utterance, he was arrested for possession of a controlled substance based on the smell of burnt marihuana and on his admission; and

(c) A search incident to arrest was conducted, which revealed a quantity of drug-like substance. The substance seized weighed 0.86 grams and was later analyzed to be cannabis (marihuana).

[15] In arriving at evaluating what would be a fair and an appropriate sentence, the court has considered the objective seriousness of the offence which, as provided by section 130 of the *National Defence* Act and 4(5) of the *Controlled Drugs and Substances Act*, is punishable by a fine not exceeding $1,000 or to imprisonment for a term not exceeding six months or to both, given that that the quantity of cannabis (marihuana) possessed does not exceed 30 grams.

[16] The court considers aggravating, in the circumstances of this case, the subjective

seriousness of the offence committed in that the possession of the substance occurred on base on both occasions, although there was no impact on other members or operations, and no evidence that the offender drove his vehicle while impaired by drugs. Also, although the court is dealing with a first-time offender in relation to the two charges before it, the evidence reveals that the offender was on counselling and probation in relation with the first offence when the second offence was committed.

[17] The court also considers the following mitigating factors as mentioned in submissions by counsel and demonstrated by the evidence presented in mitigation, especially by defence counsel:

(a) first and foremost, the offender's guilty plea, which the court considers a genuine sign of remorse and an indication that the offender is taking full responsibility for what he has done. The offender collaborated with authorities and communicated his plea early thereby avoiding the expense of a trial and potential evidentiary debates on admissibility of evidence. This admission of responsibility occurred in a very formal and public forum of this court martial;

(b) the offender's record of service with the Canadian Forces, which includes a deployment in 2010. Even if the offender has a conduct sheet, it relates to neglect in the unauthorized discharge of his firearm in 2011; an offence which does not reflect a pattern of misbehaviour. The offender's performance in the Canadian Armed Forces has been generally positive as evidenced by the documents submitted by defence counsel. They show a promising member whose career progression was halted at the time the offences were committed. Despite the charges, the offender has continued to offer satisfactory service post offence;

(c) another mitigating element considered by the court is the mental condition of the offender, which may have developed following his deployment, but became particularly acute at the time of the first offence as evidenced by the psychiatric assessment dated 24 July 2013 introduced as an exhibit; and

(d) finally, and most importantly, the court considers the age and potential of the offender to make positive contribution to Canadian society in the future even if his continued service in the Canadian Armed Forces needs to be assessed in light of the decision of this court.

[18] The prosecutor and the defence counsel made a joint submission on sentence to be imposed by the court. They recommended that this court impose a sentence of a fine in the amount of $1,000 in order to meet justice requirements. Although this court is not bound by this recommendation, it is generally accepted that a 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 public interest.

[19] In this case, I have considered the jurisprudence presented to me with the consent of both counsel, which constitutes useful precedents to appreciate what would be an appropriate sentence in this case. Considering the nature of the offence, the circumstances it was committed, the applicable sentencing principles, including sentences imposed on other offenders for similar offences committed in similar circumstances by military tribunals, and the aggravating and the mitigating factors mentioned previously, these cases reassure me that the punishment of a fine in the amount of $1,000 jointly proposed by counsel is within the range of an appropriate sentence in this case.

[20] The joint submission made by counsel is not contrary to the public interests and will not bring the administration of justice into disrepute. The court will, therefore, accept it.

[21] The prosecution is asking this court to make an order pursuant to sub-section 490(9) of the *Criminal Code* to order that the marihuana seized by the police in relation to the charges before the court be destroyed. The defence objects to such an order being made as counsel does not see an authority for such an order.

[22] After considering this issue, the court is not satisfied that it has the power to issue the order demanded by the prosecution as the prosecution has not clearly established that the military judge presiding at court martial is a *judge* or *justice* as those terms are defined at sections 488.1 or 552 of the *Criminal Code*. Furthermore, the court considers that powers found at section 179 of the *National Defence Act* or article 101.01 of the *Queen's Regulations and Orders* are insufficient to provide such specific authority as is required here to make the order requested. Consequently, the court will not issue the order.

[23] Private Lyons, the circumstances of the charges you have pleaded guilty to reveal a behaviour that is highly unacceptable in the Canadian Forces. It may be that your future with the military is not a matter that is entirely within your control at this point, yet the letters produced by your counsel from friends and family reveal to me that you can count on some support in your efforts to overcome your personal difficulties and remain a productive member of society; a member who respects the law. I trust you will not disappoint your friends and family by reoffending again.

FOR THESE REASONS, THE COURT:

[24] **FINDS** you guilty of the second and third charges under section 130 of the *National Defence Act* for possession of marihuana contrary to the *Controlled Drugs and Substances Act*.

[25] **SENTENCES** you to a fine in the amount of $1,000.

Counsel:

Major T.E.K. Fitzgerald, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Major S.L. Collins, Directorate of Defence Counsel Services
Counsel for Private J.S. Lyons