COURT MARTIAL

Citation: *R. v. Whitten,* 2012 CM 4004

Date: 20120207
Docket: 201143

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Ex-Master Seaman T.R.F. Whitten, Offender

Before: Lieutenant-Colonel J-G Perron, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Ex-Master Seaman Whitten having accepted and recorded your pleas of guilty to charges number 1 and 2, the court now finds you guilty of these charges. You have pled guilty to having ill-treated an ordinary seaman and an able seaman. The court must now determine a just and appropriate sentence in this case.

[2] The statement of circumstances, to which you formally admitted the facts as conclusive evidence of your guilt, provides this court with the circumstances surrounding the commission of these offences.

[3] At the time of the offences ex-Master Seaman Whitten was a member of the Canadian Forces Fleet School Esquimalt. Canadian Forces Fleet School Esquimalt ran the QL3 Sonar Operator Course from April to December 2009. Ex-Master Seaman Whitten was an instructor on that course.

[4] The ordinary seaman, referred to at charge number 1, was a male candidate on the Sonar Operator Course. At the beginning of the course ex-Master Seaman Whitten

swung his leg over the back of the ordinary seaman's chair and straddled it with him still seated. Ex-Master Seaman Whitten pressed his body against the ordinary seaman and began grinding his crotch against the back of the ordinary seaman in a sexual manner.

[5] Having read the ordinary seaman's personnel file ex-Master Seaman Whitten made comments concerning the ordinary seaman's personal information while in class; such as, the ordinary seaman was from Mount-Uniacke and that he had lived in a trailer park. Ex-Master Seaman Whitten also said the ordinary seaman was a piece of Nova Scotia shit and that people from Nova Scotia were all gay. Ex-Master Seaman Whitten also made comments about the mother of the ordinary seaman and going on a date with her.

[6] During the course ex-Master Seaman Whitten made comments in class stating he wanted to be on ship with the ordinary seaman. He stated the ordinary seaman would be his bitch. He stated he would take a broom handle, place a condom on it, and place the handle up the ass of the ordinary seaman.

[7] In August 2009, the ordinary seaman injured his leg and was given an air cast to wear by the treating physician. Ex-Master Seaman Whitten did not believe the ordinary seaman was injured and made him remove the cast to prove his injury. On another occasion the ordinary seaman suffered from food poisoning. Ex-Master Seaman Whitten made the ordinary seaman get a chit from the base hospital to indicate that he could use the bathroom as required.

[8] The Sonar Operator Course had a ship phase from 30 November to 11 December 2009. During that phase ex-Master Seaman Whitten instigated a quarrel with the ordinary seaman by pushing him and threatened to choke him.

[9] The able seaman referred to at charge number 2 was a male candidate on that course. During the ship phase ex-Master Seaman Whitten struck the able seaman across the calves with a broomstick leaving two red marks.

[10] As indicated by the Court Martial Appeal Court sentencing is a fundamentally subjective and individualized process where the trial judge has the advantage of having seen and heard all of the witnesses and it is one of the most difficult tasks confronting a trial judge. (see *R v Tupper* 2009 CMAC 5 para 13)

[11] The Court Martial Appeal Court has stated that the fundamental purposes and goals of sentencing as found in the *Criminal Code of Canada*[1] apply in the context of the military justice system and a military judge must consider these purposes and goals when determining a sentence. (see *R v Tupper* para 30) The fundamental purpose of sentencing is to contribute to respect for the law and the protection of society, and this includes the Canadian Forces, by imposing just sanctions that have one or more of the following objectives:

[1] R.S., 1985, c. C-46

a. to denounce unlawful conduct;

b. to deter the offender and other persons from committing offences;

c. to separate offenders from society, where necessary;

d. to assist in rehabilitating offenders;

e. to provide reparations for harm done to victims or to the community; and

f. to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

[12] The court must determine if protection of the public would best be served by deterrence, rehabilitation, denunciation, or a combination of those factors.

[13] The sentencing provisions of the *Criminal Code*, ss. 718 to 718.2, provide for an individualized sentencing process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender. (see *R v Angelillo* 2006 SCC 55, at para 22) A sentence must also be similar to other sentences imposed in similar circumstances. (see *R v L.M.* 2008 SCC 31, at para 17) The principle of proportionality is at the heart of any sentencing. (see *R v Nasogaluak*, 2010 SCC 6, at para 41) The Supreme Court of Canada tells us that proportionality means a sentence must not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence.

[14] The court must also impose a sentence that should be the minimum necessary sentence to maintain discipline. The ultimate aim of sentencing is the restoration of discipline in the offender and in military society. Discipline is one of the fundamental prerequisites to operational efficiency in any armed force.

[15] The prosecution and your defence counsel have jointly proposed a sentence of a severe reprimand and a fine in the amount of $3,000. They propose the fine be paid at a rate of $200 per month starting on the 1st day of May. The Court Martial Appeal court has stated clearly that the sentencing judge should not depart from the joint submission unless the proposed sentence would bring the administration of justice into disrepute or unless the sentence is otherwise not in the public interest.

[16] I will now set out the aggravating circumstances and the mitigating circumstances that I have considered in determining the appropriate sentence in this case. I consider the following to be aggravating:

a. it appears from the facts found in the statement of circumstances that you disliked the ordinary seaman who is the victim of the ill-treatment at charge number 1. Why else would you treat him in a manner you did? I have not been provided any information as to the possible cause of this

animosity towards the ordinary seaman other than a possible unwelcome remark by the ordinary seaman concerning your spouse. Over a period of approximately eight months you subjected him to physical abuse and to verbal abuse in the classroom and onboard ship. These numerous incidents over such a lengthy period of time are an important aggravating factor; and

b. while you ill-treated the able seaman only once, you hit him with enough force to cause red marks on his calves. You were an instructor and a master seaman at the time of the offences. You ill-treated students. We cannot accept this type of behaviour from our leaders in the Royal Canadian Navy or in the Canadian Forces.

[17] As to the mitigating circumstances, I note the following:

a. you do not have a conduct sheet. You are a first time offender;

b. you have pled guilty to both charges. Therefore, a plea of guilty is usually considered a mitigating factor. This approach is generally not seen as contradiction of the right to silence and of the right to have the Crown prove beyond a reasonable doubt the charges laid against the accused, but is seen as a means for the courts to impose a more lenient sentence because the plea of guilty usually means that witnesses do not have to testify and that it greatly reduces the costs associated with the judicial proceeding. It is also usually interpreted to mean that the accused wants to take responsibility for his or her unlawful actions and the harm done as a consequence of these actions; and I have observed you during this short trial and you truly appear to be remorseful;

c. I have reviewed the two Personnel Evaluation Reports for the reporting periods of 2009–2010 and 2010–2011 found at Tab 8 of Exhibit 7. Your performance was rated as exceeded standard and your potential was assessed as above average. You were described as an outstanding instructor who inspired his students to improve. It was noted that you "could be counted upon to accept responsibility and for his actions and the actions of his subordinates;"

d. Petty Officer 2nd Class Strong testified in mitigation and he has known you for three years. He stated the students thought highly of you as did your peers. He thought the allegations he had heard at the time of your removal from the course were totally out of character;

e. based on the testimony of Petty Officer 2nd Class Strong and your Personnel Evaluation Reports it would appear your actions are out of character. Yet, one has to ask why you would persecute that ordinary sea-

man for so long. The evidence before this court does not explain that behaviour; and

f. Your defence counsel is quite right when he states you have blemished your record. You were a competent sonar operator as well as a competent instructor. It would appear that you had a successful career until that point in time. Your support to the RCMP as an auxiliary constable, your participation in the Defence Aboriginal Advisory Group, and the letters of appreciation found at Exhibit 7 demonstrate that you have been a valued member of the civilian community as well as of the military community. The evidence before this court does not allow me to fully understand the underlying reasons for your behaviour toward those subordinates, but they do sound totally out of character.

[18] I agree with the prosecutor that denunciation and general deterrence are the sentencing principles that need to be applied in the present case. Having reviewed the totality of the evidence, the jurisprudence, and the representations made by the prosecutor and your defence counsel, I have come to the conclusion that the proposed sentence is adequate considering your rank and position at the time of the offences and the specific circumstances of the offences. I have thus come to the conclusion that the proposed sentence would not bring the administration of justice into disrepute and that the proposed sentence is in the public interest. Therefore, I agree with the joint submission of the prosecutor and your defence counsel.

FOR THESE REASONS, THE COURT:

[19] **FINDS** you, ex-Master Seaman Whitten, guilty of the first and second charges under s. 95 of the *National Defence Act*.

[20] **SENTENCES** you to severe reprimand a fine in the amount of $3,000. The fine shall be paid in monthly instalments of $200 starting on the 1st day of May 2012.

Counsel:

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

Mr M. Hunt, Dinning Hunter Lambert & Jackson Barristers and Solicitors
Counsel for ex-Master Seaman T.R.F. Whitten