COURT MARTIAL

Citation: *R v Stull*, 2013 CM 2015

Date: 20131101
Docket: 201375

Standing Court Martial

Canadian Forces Base Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Private R.C. Stull, Offender

Before: Colonel M.R. Gibson, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Private Stull has admitted his guilt to one count of absence without leave under section 90 of the *National Defence Act*. The court must now impose a fit and just sentence.

[2] The Statement of Circumstances entered into evidence by the prosecution, and agreed to by defence counsel on behalf of Private Stull, indicates the following facts: Private Stull is a member of the Regular Force serving with 423 Maritime Helicopter Squadron, Shearwater, Nova Scotia; on the evening of 13 May 2013, Private Stull requested permission by email from a supervisor to participate in the maintenance being performed on a particular maritime helicopter; on 14 May 2013, Private Stull was informed that he was granted permission to participate in the maintenance of that helicopter and instructed to report to Master Corporal Nadeau at 0800 hours on 14 May 2013 to assist with the engine removal of the helicopter.

[3] Private Stull understood that his place of duty on 14 May 2013 was the 423 Maritime Helicopter Squadron maintenance hangar. Private Stull reported to Master Corporal Nadeau at 0800 on 14 May 2013 and worked with the crew until 1200, at which time the crew was given a lunch break of one hour.

[4] At that time, Private Stull informed Master Corporal Nadeau that he had a dental appointment in the afternoon and requested permission to attend. Master Corporal Nadeau gave Private Stull permission to attend the dental appointment in question following which Master Corporal Nadeau expected Private Stull to return to work with the crew. Private Stull also contacted Sergeant Brooks around 1300 hours on 14 May 2013 to inform him that he had a dental appointment and asked if he had to return to work afterwards. Sergeant Brooks told him to report to work once the appointment would be completed as it would last approximately 30 minutes. Private Stull understood that he was not excused from his place of duty other than to attend a dental appointment

[5] Private Stull's access card was scanned exiting the 423 Maritime Helicopter Squadron maintenance hangar through the turnstile. He proceeded to have lunch and to call his girlfriend. Private Stull re-entered the hangar and returned to his place of duty around 1415 and reported to Master Corporal Nadeau.

[6] On 15 May 2013, Master Corporal Osmond asked Private Stull to provide a written note for his dental appointment as he had to write a daily report regarding Private Stull's work performed on 14 May 2013. Private Stull informed Master Corporal Osmond at that time that he had to reschedule the said appointment. Private Stull provided timings for his whereabouts to Master Corporal Osmond. Upon review of the timings provided by Private Stull, Master Corporal Osmond became suspicious as the reported times to travel from the hangar to the dental clinic did not appear feasible, and he proceeded to inform Master Warrant Officer Scott, the flight crew chief, of the issue.

[7] Master Warrant Officer Scott interviewed Private Stull later on 15 May 2013. Private Stull reiterated that he had a dental appointment which he rescheduled when he reported to the clinic and added that after that appointment he had to stop at the veterinary clinic to obtain medication for his dog. Master Warrant Officer Scott asked him why he would reschedule an appointment when he was already at the clinic. Private Stull then admitted that he did not have a dental appointment, but reiterated that he did have a veterinarian appointment. Master Warrant Officer Scott then proceeded to ask him the name of the veterinarian and that he would confirm with them that he indeed picked-up medication or had an appointment. Private Stull then admitted that he did not have such an appointment.

[8] In summary, the Statement of Circumstances indicated that Private Stull received authorization to be absent from his place of duty for part of day on 14 May 2013 to attend a dental appointment. Private Stull did not have any other authorization to be absent from 423 Maritime Helicopter Squadron maintenance hanger on 14 May 2013, and he did not have a dental appointment on that date. Private Stull was, therefore, ab-

sent from 423 Maritime Helicopter Squadron maintenance hangar between 1300 and 1415 hours on 14 May 2013.

[9] Counsel for the prosecution and defence have made a joint submission on sentence. They recommend that Private Stull be sentenced to a severe reprimand and a fine in the amount of $1,000, payable in five monthly instalments of $200.

[10] The Canadian Forces Conduct Sheet for Private Stull introduced in evidence indicated three previous convictions at summary trial by the commanding officer of 423 Squadron: the first, on 3 February 2012, for a *NDA* section 90 AWOL offence, for which he was sentenced to 48 hours extra work and drill; the second, on 31 January 2013, for a *NDA* section 90 AWOL offence, for which he was sentenced to seven days detention; and the third, on 31 January 2013, for an offence under section 125(1) of the *National Defence Act* for, with intent to deceive, altering a document issued for military purposes, for which he was sentenced to reduction in rank from corporal to private.

[11] In his submission, the prosecutor emphasized the application of the sentencing principles of general and specific deterrence, and rehabilitation. He submitted that given the circumstances of the case, the following were aggravating factors: that it was a premeditated offence; that Private Stull initially lied to members of his chain of command; the entries on the conduct sheet for two previous convictions under section 90 of the *National Defence Act*; the fact that Private Stull had repeated the same offence, notwithstanding that he had already received a stiff sentence at summary trial by his commanding officer; and the lack of respect for the chain of command and for his colleagues.

[12] In mitigation, the prosecutor emphasized the importance of the guilty plea offered by Private Stull and his relatively young age of 26. He also asserted that the fact that Private Stull had been offered an Intermediate Engagement for 25 years service evidenced the confidence of his chain of command that Private Stull could serve effectively.

[13] It should be noted that in response to questions from the court, the prosecution later submitted a document, entitled "Terms of Service," at Exhibit No. 12 in evidence, indicating that Private Stull was offered and accepted an Intermediate Engagement for 25 years, or an IE25, in September 2010, well before the offences on the conduct sheet, or the date of the offence to which Private Stull has plead guilty in May 2013. The court thus places very limited weight on the submission of counsel that this offer of an IE25 in 2010 should be taken to represent the continuing confidence of Private Stull's chain of command in 2013 as to his ability to continue to serve effectively.

[14] Private Stull's defence counsel emphasized the importance in mitigation of his guilty plea, and the fact that it was offered at an early opportunity, the fact that he had suffered the public embarrassment of going through the court martial process, the relatively young age of Private Stull, the fact that he had been offered and accepted an IE25, and the lack of evidence of any significant operational impact or other injury aris-

ing from the commission of the offence. She also submitted that his various assessments had shown an overall trend of improvement in his performance from 2009 onwards.

[15] The fundamental purposes of sentencing by service tribunals in the military justice system, of which courts martial are one type, are: to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[16] The fundamental purposes are achieved by the imposition of just sanctions that have one or more of the following objectives: to promote a habit of obedience to lawful commands and orders; to maintain public trust in the Canadian Forces as a disciplined armed force; to denounce unlawful conduct; to deter offenders and other persons from committing offences; to assist in rehabilitating offenders; to assist in reintegrating offenders into military service; to separate offenders, if necessary, from other officers or non-commissioned members or from society generally; to provide reparations for harm done to victims or to the community; and to promote a sense of responsibility in offenders and an acknowledgement of the harm done to victims and to the community.

[17] The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[18] Other sentencing principles include: a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances; a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; an offender should not be deprived of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances; a sentence should be the least severe sentence required to maintain discipline, efficiency and morale; and any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

[19] In the case before the court today, I must determine if the sentencing purposes and objectives would best be served by deterrence, denunciation, rehabilitation, or a combination of these factors.

[20] Offences such as the section 90 offence of being absent without leave in this case are aimed to protect and preserve the core values of military discipline. The punishments imposed should emphasize the objectives of general and specific deterrence, as well as denunciation of the unlawful conduct. The sentence given by the court should also be tailored to meet the objectives of rehabilitating offenders and assisting their reintegration into military service.

[21] The court must impose a sentence that is of the minimum severity necessary to maintain discipline, efficiency and morale. Discipline is that quality that every Canadian Forces member must have that allows him or her to put the interests of Canada and

of the Canadian Forces before personal interests. This is necessary because members of the Canadian Forces must promptly and willingly obey lawful orders that may potentially have very significant personal consequences, up to injury or even death. Discipline is described as a quality because ultimately, although it is something which is developed and encouraged by the Canadian Forces through instruction, training and practice, it is something that must be internalized, as it is one of the fundamental prerequisites to operational effectiveness in any armed force.

[22] The court considers that the aggravating factors in this case are the following:

(a) that Private Stull violated one of the most important obligations of members of the Canadian Forces, to be present where they are required to be, reliably and on time. While the objective gravity of the offence under section 90 of the *National Defence Act*, which is punishable by imprisonment for less than two years, is towards the lower end of the scale amongst the offences created in the *National Defence Act*, the reality is that this offence provision is one of the key tools for maintaining discipline in the Canadian Forces at the unit level;

(b) secondly, the previous convictions of Private Stull for substantially similar offences in the recent past disclosed on the conduct sheet; and

(c) thirdly, that Private Stull misled his superiors during and after committing the offence.

[23] Taken together, the offence to which Private Stull has now pleaded guilty, in conjunction with the previous similar offences indicated on the conduct sheet, show that he has not yet mastered the concept of self-discipline or of being a responsible and trustworthy member of the Canadian Forces.

[24] The mitigating factors in this case include the following:

(a) that Private Stull accepted responsibility for the offence by entering a guilty plea. Moreover, he communicated this intention to do so to the prosecution through his counsel at an early opportunity. The prosecutor indicated that he gave significant weight to this fact when considering the prosecution's position on sentence; and

(b) there was some documentary evidence of improvement in job-related tasks.

[25] The initial submissions made by counsel in this case were problematic. While counsel are representatives of the prosecution and the accused respectively, they are also officers of the court. Counsel have a duty to assist the court in arriving at a fit, an appropriate and just sentence in light of the facts of the case and of the law applicable to it.

[26] It is ultimately the responsibility of the court to arrive at a fit, appropriate and just sentence. While the court must have due regard to any joint submission by counsel as to sentence and be cognizant that much may have gone into the arriving at of such a submission of which the court may not or, indeed, perhaps even should not be aware, of which I shall speak more in a moment, it is ultimately the duty and responsibility of the court to determine sentence. The court is not here to provide a rubber stamp to sentencing deals negotiated between counsel. In order to fulfill its duties, the court must be satisfied as to the fitness of the proposed sentence. The evidence introduced by counsel, and the submissions they make, must, therefore, be objectively sufficient to assist the court in fulfilling its duty.

[27] The submissions made by counsel on sentence should be consistent with the objectives of sentencing that they urge upon the court as paramount in that particular case. And the evidence submitted should substantiate those submissions and provide a sufficient evidentiary foundation for the trial judge to be satisfied that he or she has sufficient information to fashion an appropriate sentence.

[28] It is settled law that a trial judge should not depart from a joint submission by counsel lightly and without sound reasons. In *R v Private Chadwick Taylor*, 2008 CMAC 1, at paragraph 21, the Court Martial Appeal Court cited with approval the acceptable procedure when a sentencing judge is presented with a joint recommendation outlined by Steel J.A. in the case of *R v Sinclair*,[2004] M.J. No. 144, 185 C.C.C. (3d) 569 (C.A.);

> [17] Thus, the law with respect to joint submissions may be summarized as follows:
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> (1) While the discretion ultimately lies with the court, the proposed sentence should be given very serious consideration.
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> (2) The sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons may include, among others, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.
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> (3) In determining whether cogent reasons exist (*i.e.*, in weighing the adequacy of the proposed joint submission), the sentencing judge must take into account all the circumstances underlying the joint submission. Where the case falls on the continuum among plea bargain, evidentiary considerations, systemic pressures and joint submissions will affect, perhaps significantly, the weight given the joint submission by the sentencing judge.
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> (4) <u>The sentencing judge should inform counsel during the sentencing hearing if the court is considering departing from the proposed sentence in order to allow counsel to make submissions justifying the proposal</u>.
>
> (5) The sentencing judge must then provide clear and cogent reasons for departing from the joint submission. Reasons for departing from the proposed sentence must be more than an opinion on the part of the sentencing judge that the sentence would not be

> enough. The fact that the crime committed could reasonably attract a greater sentence is not alone reason for departing from the proposed sentence. The proposed sentence must meet the standard described in para. 2, considering all of the principles of sentencing, such as deterrence, denunciation, aggravating and mitigating factors, and the like.

[29] The court has significant concerns with the sentence proposed by counsel in light of the importance of the objectives of general and specific deterrence, and rehabilitation asserted by the prosecution. This is particularly the case given the previous convictions on the conduct sheet for similar offences, committed in the relatively recent past, for one of which Private Stull received the custodial sentence of the punishment of detention. The step principle of sentencing would normally require that the commission of a further similar offence by an offender would require a more severe sentence, not a lesser one.

[30] The Scale of Punishments set out at section139 of the *National Defence Act* is a hierarchical one; that is to say, the punishments are set out in order of severity. The punishments of severe reprimand and fine jointly recommended by counsel in this case are both lower in the scale of punishments than the punishments of detention and reduction in rank that the accused has already received in respect of the very similar offences for which he was sentenced in January 2013.

[31] The joint submission of counsel is inconsistent with the step principle of sentencing. When invited by the court to suggest why this should not be a significant factor in this case, both counsel suggested that the fact that the previous sentences had been awarded at summary trial should incline to their being given less weight because they may have been unduly harsh.

[32] With respect, the court finds this response to be unpersuasive in the circumstances of this case. Commanding officers are responsible for the maintenance of discipline in their units and to dismiss the sentences awarded at summary trial as inapt without knowledge of the circumstances and facts of those convictions is unhelpful to the court.

[33] Another concern arises when one considers the appropriateness of the punishment of severe reprimand to a member of the rank of private, which is the most junior rank in the Canadian Forces. The punishment of severe reprimand is meant to express disapprobation of the conduct of members of the Canadian Forces for their having failed to live up to the standards expected of them, having regard particularly to their seniority and level of experience. It is particularly appropriate for senior non-commissioned members and senior officers. Its applicability to members of the rank of private is questionable, given their low level of training and experience. The punishments set out in the *National Defence Act* are intended to serve a particular purpose, and they should not be applied in a mechanical or boilerplate fashion. In proposing or determining an appropriate sentence, due regard should be had to the purpose and suitability of particular punishments.

[34] However, as indicated above, the question that the court must ask itself is not whether the proposed sentence is one that the court would have awarded absent the joint submission. The court is required to consider whether there are cogent reasons to depart from the joint submission; that is, whether the proposed sentence is unfit, unreasonable, would bring the administration of justice into disrepute, or be contrary to the public interest.

[35] In this case, on its facts, given the previous convictions of Private Stull for very similar offences in the recent past, absent the joint submission, the court would have been inclined to impose a custodial sentence of detention in order to satisfy the fundamental purpose of sentencing to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale.

[36] However, while the proposed sentence is very close to the line, it cannot in the court's estimation be said to be clearly one that would bring the administration of justice into disrepute or be contrary to the public interest. The question is whether it is unfit or unreasonable in the circumstances. As I have said, the court would have arrived at a different conclusion as to the appropriate sentence absent the joint submission. The joint submission is, on the facts, very low; however, it is not so low as to be clearly unfit.

[37] Therefore, the court will not depart from the joint submission of counsel as to sentence in this case.

FOR THESE REASONS, THE COURT:

[38] **FINDS** you guilty of the first charge under section 90 of the *National Defence Act*. With the leave of the court pursuant to section 165.12(2) of the *National Defence Act*, the prosecution has withdrawn the second charge under section 129 of the *National Defence Act*.

[39] **SENTENCES** you to a severe reprimand and a fine in the amount of $1,000, payable in five equal and consecutive monthly instalments of $200, starting on 15 November 2013.

Counsel:

Major K. Lacharité, Canadian Military Prosecution Services
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Major S.L. Collins, Directorate of Defence Counsel Services
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