COURT MARTIAL

Citation: *R v Tremblay*, 2013 CM 4031

Date: 20131128
Docket: 201332

Standing Court Martial

St-Joseph Armoury
Montréal, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Major R. Tremblay (retired), Offender

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

OFFICIAL ENGLISH TRANSLATION

REASONS FOR SENTENCE

(Orally)

[1] Major Tremblay, having accepted and recorded your admission of guilt in respect of the fourth count, I now find you guilty of this count filed under section 97 of the *National Defence Act*, namely, drunkenness. You had been charged with three counts filed under section 129 of the *National Defence Act*, namely, abuse of authority and harassment, contrary to *Defence Administrative Orders and Directives* 5012-0, and one count filed under section 97 of the *National Defence Act*, namely, drunkenness. The prosecution withdrew one count of abuse of authority and one count of harassment and did not introduce any evidence on another count of abuse of authority. I must now impose an appropriate sentence, which must be the minimum required sentence in the circumstances of the case to ensure that discipline is served.

[2] The Court Martial Appeal Court of Canada tells us at paragraphs 30 to 33 of its decision in *Private R.J. Tupper v R*, 2009 CMAC 5, that a military judge must consider

the fundamental purposes and goals of sentencing set out at sections 718.2 and following of the *Criminal Code of Canada*. The sentence must also be "proportionate to the gravity of the offence and the degree of responsibility of the offender" and should be "similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances.

[3] Section 718 of the *Criminal Code* states as follows:

> The fundamental purpose of sentencing is to contribute . . . to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
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> (*a*) to denounce unlawful conduct;
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> (*b*) to deter the offender and other persons from committing offences;
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> (*c*) to separate offenders from society, where necessary;
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> (*d*) to assist in rehabilitating offenders;
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> (*e*) to provide reparations for harm done to victims or to the community; and
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> (*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

As was stated by counsel for the prosecution, these purposes and principles will also appear in the Code of Service Discipline once certain provisions of the *Strengthening Military Justice in the Defence of Canada Act*, S.C. 2013, c. 24, come into force.

[4] Counsel for the prosecution suggests that an appropriate minimum sentence for this offence is a reprimand and a $2,000 fine. He submits that the applicable sentencing principles are denunciation and general and specific deterrence. Your lawyer, on the other hand, argues that the appropriate sentence for this offence is a reprimand and a fine of $500 to $750 and that rehabilitating the offender should be considered.

[5] The morning of 17 December 2011, Major Tremblay went to St-Joseph Armoury for a troop lunch with 51 Field Ambulance. Major Tremblay was the deputy commanding officer of this Reserve Force unit. After lunch, Major Tremblay was in the 51 Field Ambulance combined mess with certain members of the unit and their guests. As the day wore on, Major Tremblay drank several alcoholic beverages. That evening, he sat down at the bar, next to a civilian guest, Ms. Jauron, and introduced himself. They had never met before. Ms. Jauron had been invited to the Armoury by a young female member of the unit. Ms. Jauron was 28 years old at the time. At one point, while under the influence of alcohol, Major Tremblay made a number of crude and inappropriate sexual remarks to her. Major Tremblay also made physical contact with Ms. Jauron by putting his hand on her thigh in an inappropriate manner.

[6] Ms. Jauron was shocked, shaken and disappointed by Major Tremblay's behaviour, this being her first social encounter with Forces members in a National Defence facility. She pulled away from Major Tremblay and told her friend about the situation. Her friend notified the duty officer and another officer present of the incident. They were advised to make a formal complaint, as such a situation was unacceptable.

[7] Having summarized the main facts of this case, I will now concentrate on sentencing in this case. Therefore, in considering what would be an appropriate sentence, I considered the following mitigating factors and aggravating factors. I will begin with the mitigating factors:

a. You have admitted your guilt. In this case, you pleaded guilty the morning of the second day of the trial, after the trial had initially been postponed for a day and then adjourned for another day. Ten prosecution witnesses attended over these first two days. As your counsel said, the Court does not have all the information explaining why this plea was not entered earlier, but the Court does not agree with your counsel that a plea is a mitigating factor, period. A guilty plea usually indicates some remorse. Furthermore, this plea usually allows the Crown to save considerable sums of money and to avoid calling numerous witnesses. Such was not the case here. It is true that an accused and an offender is under no obligation to testify at his or her trial. Moreover, an offender who testifies to sincerely apologize for breaking the law and committing wrongdoings clearly states to the Court that he or she regrets his or her actions. This also shows the Court that he or she has already started down the road to rehabilitation and that the principle of specific deterrence does not have to be considered in sentencing. I find your admission of guilt to be a mitigating factor, but I do not give it as much weight in your case as in cases where the accused indicates right away in the disciplinary process that he or she wants to plead guilty.

b. You do not have a conduct sheet or a criminal record. You enrolled in 1972 and served in the Regular Force until 2007. You began your career as a private and received you officer's commission in 1990 after completing university. You were promoted to major in 2003. You commanded 41 Medical Clinic at St-Jean Garrison from 2005 to 2006. You joined the Reserve Force in 2007 and served there until your discharge in 2013, when you reached the mandatory retirement age of 60 years old.

c. Although you were relieved of your duties as deputy commanding officer in February 2012 following an incident in December 2011, your military service record—as appears from Exhibit 3 and Exhibit 4, which are two summaries of personal and military records, the first for the Regular Force and the second for the Reserve Force; Exhibit 9, four personnel evaluation reports (PERs) for the periods from 2006 to 2010; and Exhibit 13, a letter of commendation from Lieutenant-Colonel Renaud, a personal friend—tells me that you had an excellent career and that you proved yourself to be an asset

to the Health Services Group. Furthermore, the evidence presented at trial shows that you were given a written warning concerning your conduct in the year 2010 or early 2011. The Court was not informed of the exact reasons for this written warning, but it was taken into consideration by Lieutenant-Colonel Barrette, the commanding officer of 51 Field Ambulance, in his decision to recommend that you be relieved of duty because he saw a connection between this warning and the incident of 17 December 2011. So it appears that this honourable career was tarnished by at least two incidents at the end of it. Although you have not misbehaved since the incident, it appears that you have had few occasions to be in uniform since February 2012.

d. The offence occurred on 17 December 2011. You were relieved of your military duties by the commander of 4 Health Services Group of the Canadian Forces on 2 February 2012. The military police investigation was completed on 19 June 2012. On 3 August 2012, charges were laid against Major Tremblay in a record of disciplinary proceedings. The case was referred to the Director of Military Prosecutions on 8 January 2013. The charge sheet was drawn up on 14 March 2013, and the Court Martial was convened on 15 August 2013, for a trial date of 25 November 2013. I asked counsel questions regarding the 23-month period between the offence and the trial. The Court was given no precise explanations for the 7-month period between the end of the investigation and the charges initially laid against Major Tremblay and the 5 months it took to send the charges from the unit to the Director of Military Prosecutions. As I have often remarked in previous courts martial, a long delay between the offence and the trial is inconsistent with unit discipline and may cause prejudice to the accused.

e. It therefore appears from the evidence that you were relieved of duty in accordance with article 101.08 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), Relief From Performance of Military Duty – Pre and Post Trial. Lieutenant-Colonel Barrette explained that he had lost confidence in you and that he had to consider the wellbeing of the unit when he explained why you were relieved of duty. Paragraph (4) of article 208.31 of the QR&O states that the pay and allowances of an officer or non-commissioned member who is relieved from the performance of military duty under either article 19.75 or article 101.08 of the QR&O is not subject to forfeiture.

f. Major Tremblay was relieved of duty and could not be with the unit except for certain very specific reasons. Major Tremblay's lost wages totalled approximately $23,891 for the period from 2 February 2012, to 9 July 2013 (see Exhibit 12). Considering all the explanations given for these delays, I conclude that the unjustifiable delay represents a period of about 5 months, or about 1 month to prepare an RDP and 4 months to refer the charges to the

Director of Military Prosecutions. The total loss being over a period of 17 months, the loss related to the 5-month delay is approximately $7,000.

g. All members of the Canadian Forces receive their pay in accordance with the QR&O, Volume 3, and with the *Compensation and Benefits Instructions*, the CBI. A member of the Regular Force and members of the Reserve Force employed in Class B or Class C, in military jargon, receive a monthly salary. A Class-A reservist is paid only if he or she performs work for the unit. At first glance, article 208.31 does not appear to take into consideration the real consequences of relief from performance of military duty for a Class-A reservist and seems in practice to apply only to members of the Regular Force or to reservists employed in Class B or Class C.

h. Although military duty is a privilege, not a right, any decision, such as relieving an officer of duty, has consequences for an individual, and the military authorities that make such decisions must also take these consequences into consideration. The Court cannot comment on the decision to relieve Major Tremblay of duty, but the Court is of the view that the unjustified delay not only did not contribute to serving discipline but also represented a significant loss of income for Major Tremblay. The delay from 19 June 2012 to 8 January 2013 seems to indicate that Major Tremblay's chain of command did not consider the consequences of this delay in terms of discipline and in respect of Major Tremblay. I find that this delay and its consequences in respect of Major Tremblay are a significant mitigating factor.

i. I must admit that I am surprised at the comments of counsel regarding the PERs in Exhibit 9, which were introduced by your counsel with the prosecution's consent. PERs are usually presented to the Court to show an offender's performance, and the people who sign these reports are not usually called as witnesses to explain them. The Court does not understand why it is necessary in this case to explain the background factors for these reports, as argued by counsel for the prosecution.

j. As your counsel argued, this is not a case of harassment, but one of drunkenness. So, I agree with him that alcohol played a role in this case. Moreover, this is no excuse for your conduct.

[8] I will now discuss the aggravating factors:

a. The nature of the offence and the punishment provided for by Parliament. The maximum penalty for this offence is "imprisonment for less than two years . . . , except that, where the offence is committed by a non-commissioned member who is not on active service or on duty or who has not been warned for duty, no punishment of imprisonment, and no punishment of detention for a term in excess of ninety days, shall be

imposed". This shows that Parliament holds officers to a much higher standard of conduct than a non-commissioned member who is not on duty. This penalty, imprisonment for less than two years, is the fourth most severe in the scale of penalties found in section 139 of the *National Defence Act*. This is an objectively serious offence in the case of an officer.

b. An officer must become acquainted with, observe and enforce the *National Defence Act* and the QR&O and promote the welfare, efficiency and good discipline of all who are subordinate to the member (see article 4.02 of the QR&O). You clearly breached your duty as an officer that evening. You were drunk that evening at your unit's combined mess after the troop's Christmas lunch. You made crude and inappropriate sexual remarks to a 28-year-old woman and touched her thigh in an inappropriate manner. She was shocked, shaken and disappointed by your behaviour. This was her first experience with military members in a social situation in a National Defence facility. She pulled away and told her friend about the incident.

c. This is not the behaviour expected of a senior officer and deputy commanding officer. Although you were in the combined mess, the Court has no evidence that other members of your unit observed your conduct, nor is there any evidence of what effect this conduct had on the unit. However, it is clear that your conduct was disorderly and brought discredit on Her Majesty's service. In addition, everyone, military or civilian, should expect to feel safe in a National Defence facility.

d. Your counsel, commenting on the judgments he had submitted to the Court, stated that a master warrant officer or a chief warrant officer is at the same level as an officer. I do not agree. The law and custom demand far more of an officer than a non-commissioned member because an officer holds a command position that is distinct from that of a senior non-commissioned officer or a chief warrant officer.

[9] To determine what constitutes the appropriate sentence in this case, I took into account the circumstances surrounding the commission of the offence as revealed by the evidence presented during the sentencing hearing, the case law and the submissions by counsel. I analyzed these various factors in light of the objectives and principles applicable in sentencing. I find the case of *Captain Castle* to be far more serious than the present case, given the very nature of the offences and the circumstances in that case. The other cases, though different in terms of the facts, give me an overview of sentences involving cases of drunkenness.

[10] Major Tremblay, you have not displayed the qualities that we look for in a senior officer, and this behaviour does not give the sort of example that can be tolerated. The Canadian Forces expect more from a major in a deputy commanding officer position. I do not know if this is an isolated aberration or if this conduct is representative of you, but you have not displayed the personal qualities that are essential

to good order and discipline in the Canadian Forces and to respect for the law. Violating the Code of Service Discipline as you have done undermines good order and discipline in a unit.

[11] Considering the aggravating and mitigating factors and the need to denounce the offender's conduct and to dissuade members of the Canadian Forces from engaging in such behaviour, I will impose a sentence that will send, to you and other members of the Canadian Forces, the message that such behaviour is unacceptable and has serious consequences. Denunciation is important because the sentence must clearly indicate that the conduct an officer in a deputy commanding officer position must be exemplary.

[12] Having regard to the particular facts of this case, I find that the sentence that I will now pass is not the minimum possible sentence to ensure the protection of the public and the maintenance of discipline because I have taken into consideration the fact that you have lost a considerable amount of income because you were relieved from the performance of military duty, as well as the delay in this case.

FOR THESE REASONS, THE COURT:

[13] **FINDS** the offender guilty on the fourth count.

AND

[14] **SENTENCES** Major Tremblay to a reprimand and a fine of $1,000.

Counsel:

Major G. Roy, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Lieutenant(N) J-F. Morin, Canadian Military Prosecution Service
Student-at-law

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