COURT MARTIAL

Citation: *R. v. Zacharias*, 2012 CM 4024

Date: 20121210
Docket: 201231

Standing Court Martial

Canadian Forces Base Borden
Borden, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Sergeant B.D. Zacharias, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Sergeant Zacharias, having accepted and recorded your plea of guilty to charge number 1, the court now finds you guilty of this charge laid under section 115 of the *National Defence Act*. 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 this offence. At the time of the offence, you were employed as a vehicle technician. Between 14 July 2003 and 10 July 2006, you were posted to the Royal Canadian Dragoons (the RCD) in Petawawa.

[3] On 13 April 2010, you were found in possession at your house of the items listed at Annex A to the charge sheet and they were seized by the military police on that day. These items are commonly used by vehicle technicians in Canadian Forces units. The total value of these items is approximately $600.

[4] As indicated by the Court Martial Appeal Court, sentencing is a fundamentally subjective and individualized process and it is one of the most difficult tasks confronting a trial judge. The Court Martial Appeal Court clearly stated that the fundamental purposes and goals of sentencing as found in the *Criminal Code of Canada* apply in the context of the military justice system and a military judge must consider these purposes and goals when determining a sentence. 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:

(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.

[5] The court must determine if protection of the public would best be served by deterrence, rehabilitation, denunciation, or a combination of those factors. The sentencing provisions of the *Criminal Code*, sections 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. A sentence must also be similar to other sentences imposed in similar circumstances. The principle of proportionality is at the heart of any sentencing. 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.

[6] 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.

[7] The prosecution and your defence counsel have jointly proposed a sentence of a severe reprimand and a fine in the amount of $1,000 to be paid in monthly instalments of $200. The Court Martial Appeal Court has stated clearly that a sentencing judge should not depart from a 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.

[8] 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) Section 115 of the *National Defence Act*, receiving or retaining in his possession any property obtained by the commission of any service offence knowing the property to have been so obtained, is an objectively serious offence since one can be sentenced to imprisonment for a term not exceeding seven years or to less punishment in the scale of punishments. Only 21 of the 60 service offences found at sections 73 to 129 of the *National Defence Act* have a more severe maximum punishment than the punishment found at section 115;

(b) The court has been provided very little evidence concerning the commission of this offence. You were posted to the RCD in 2003 and you were posted to Borden in 2006. In 2010, you were found in possession of items that appear to belong to the RCD A Squadron Maintenance Section and to the RCD Maintenance HQ SQ (see Exhibit 8). Although the evidence provided by the prosecutor does not indicate that you were ever part of A Squadron or HQ Squadron, the personnel evaluation reports provided by defence counsel indicate you were employed as the A Squadron Maintenance Section 2 i/c for eight months and the RHQ Maintenance Det Commander for four months during the 01 April '04 to 31 Mar '05 reporting period, and you were employed as the A Squadron Maintenance Section 2 i/c for ten months and the HQ Squadron B Vehicle 2 i/c for two months during the 1 April '05 to 31 Mar '06 reporting period. This evidence would put you at the scene of the missing tools. Nonetheless, the evidence presented by the prosecutor only permits the court to conclude that you would have come to be in possession of these items sometime between 2003 and 2010;

(c) While every offence associated with a theft of public property must be viewed seriously, the evidence surrounding the commission of this offence, as well as the type of items seized and their total value, does not demonstrate to the court that this offence is subjectively one of the more serious offences to be tried by court martial;

(d) You were appointed as a master corporal in 2003 and you were promoted to the rank of sergeant in 2008. You have not shown the leadership qualities we expect of you. You occupied positions of leadership as a vehicle technician when you were posted to the RCD. Although the evidence provided by the prosecutor does not indicate precisely when you would have obtained the items, you did have the items in your possession when you were a sergeant;

(e) You do have a conduct sheet. It contains one entry of assault under section 266 of the *Criminal Code*. You were tried by a judge of the Ontario Court of Justice on 24 November 2009 and you were sentenced to 18 months of probation. This sentence was suspended. As such, although you are not a first time offender, the offence is quite different from the one before this court and I will not give it much weight when determining the appropriate sentence in the present case;

(f) You were 37 years old at the time of the offence and had 19 years of service with the CF. You were old enough and had enough experience to know better.

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

(a) You have pled guilty; therefore, a plea of guilty will usually be considered as a mitigating factor. This approach is generally not seen as a contradiction of the right to silence and of the right to have the prosecution prove beyond a reasonable doubt the charge 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. Having said that, I have not been provided with any evidence, nor have I heard anything that would make me believe you are truly remorseful. Nonetheless, your guilty plea is a mitigating factor;

(b) The items were seized by the military police on 13 April 2010. You were charged on 28 April 2011. A first charge sheet was preferred on 4 May 2012 and the present charge sheet was preferred on 3 December 2012. The court has not been provided with much information as to why it has taken so long to hold his court martial;

(c) Defence counsel has commented there is no evidence before this court that demonstrates this is a complex case and thus the need for a lengthy investigation. The Supreme Court of Canada has held that state conduct not rising to the level of a *Charter* breach can be properly considered as a mitigating factor in sentencing. Where the state misconduct in question relates to the circumstances of the offence or the offender, the sentencing judge may properly take the relevant facts into account in crafting a fit sentencing without having to resort to section 24(1) of the *Charter*;

(d) I am not finding that there has been any misconduct on the part of the prosecutor or any other person involved in the bringing of this case to

trial, but I have not been provided with much evidence to explain the delay. The prosecution and every authority in the disciplinary process have the duty to deal with charges as expeditiously as the circumstances permit (see section 162 of the *National Defence Act)*. Although defence counsel stated the delay in laying the charge prevented the possibility of a summary trial, the court was not provided with any evidence that Sergeant Zacharias would have elected to be tried by summary trial;

(e) As I have already stated in previous sentencing decisions, lengthy delays do not serve the purposes of discipline and of military justice. They also often have a negative impact on the offender. As such, I will consider this delay as a mitigating factor;

(f) I have reviewed the personnel evaluation reports (PER) for the annual reporting periods from 2002-2003 to 2011-2012. They consistently describe a high achiever who shows much potential to reach the next rank. Your immediate superiors know you much better than I do. They will decide what impact, if any, this conviction will have on their evaluation of your leadership potential. Although this conviction might well have a negative effect on your next annual PER, I have not been provided with any evidence that would demonstrate you will be subject to more stigma than any other member of the Canadian Forces convicted of a service offence. As such, I do not consider the potential for stigma to have more weight as a mitigating factor than in any other case.

[10] Sergeant Zacharias, stand up. I have concluded that denunciation, general and specific deterrence are the main sentencing principles that need to be applied in the present case.

[11] Having reviewed the totality of the evidence, the jurisprudence and the representations made by the prosecutor and your defence counsel, 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 of your defence counsel.

FOR THESE REASONS, THE COURT:

[12] **SENTENCES** you, Sergeant Zacharias, to a severe reprimand and a fine in the amount of $1,000. The fine shall be paid in monthly instalments of $200 starting on the 15th day of January, 2013.

Counsel:

Lieutenant-Commander B.G. Walden, Directorate of Defence Counsel Services
Counsel for Sergeant B.D. Zacharias

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