COURT MARTIAL

Citation: *R v Ravensdale*, 2013 CM 1001

Date: 20130319
Docket: 201206

General Court Martial

Canadian Forces Base Shilo
Shilo, Manitoba, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer (Retired) P.G. Ravensdale, Offender

Before: Colonel M. Dutil, Chief Military Judge

REASONS FOR SENTENCE

(Orally)

[1] The panel of this General Court Martial pronounced its finding in respect of each charge against Warrant Officer (Retired) Ravensdale on 14 February 2013. The offender was found not guilty of the first charge, a count of manslaughter by criminal negligence, and not guilty of the sixth charge, a count of negligently performing a military duty imposed on him. Warrant Officer (Retired) Ravensdale was found guilty of the remaining charges, namely two counts of breach of duty in relation of an explosive substance, one count of unlawfully causing bodily harm and one count of negligently performing a military duty imposed on him.

The findings of guilty of the court martial panel related to the following charges:

(a) The second charge and the third charge — an offence punishable under section 130 of the *National Defence Act*, that is to say, breach of duty contrary to section 80 of the *Criminal Code*:

The particulars of the second charge read as follows:

In that he, on or about 12 February 2010, at or near Kan Kala, Afghanistan, whilst serving as Second in Command of 2 Platoon, Stabilization Company A, and having in his care or control an explosive substance, to wit a Defensive Command Detonated Weapon C19, failed without lawful excuse to use reasonable care to prevent the death of Corporal Joshua Baker by that explosive substance.

Whereas, the particulars of the third charge read as follows:

In that he, on or about 12 February 2010, at or near Kan Kala, Afghanistan, whilst serving as Second in Command of 2 Platoon, Stabilization Company A, and having in his care or control an explosive substance, to wit a Defensive Command Detonated Weapon C19, failed without lawful excuse to use reasonable care to prevent bodily harm to Sergeant Mark McKay, Master Corporal William Pylypow, Corporal Wolfgang Brettner and Bombardier Daniel Scott by that explosive substance;

(b) The fourth charge — an offence punishable under section 130 of the *National Defence Act*, that is to say, unlawfully causing bodily harm, contrary to section 269 of the *Criminal Code*:

The particulars of the fourth charge read as follows:

In that he, on or about 12 February 2010, at or near Kan Kala, Afghanistan, whilst serving as Second in Command of 2 Platoon, Stabilization Company A, did unlawfully cause bodily harm to Sergeant Mark McKay, Master Corporal William Pylypow, Corporal Wolfgang Brettner and Bombardier Daniel Scott.

It must be reminded that the unlawful act alleged in the fourth charge related to the negligent performance of duties contrary to section 124 of the *National Defence Act*; and

(c) The fifth charge — negligently performed a military duty imposed on him (section 124 of the *National Defence Act*):

The particulars of that fifth charge read as follows:

In that he, on or about 12 February 2010, at or near Kan Kala, Afghanistan, whilst serving as Second in Command of 2 Platoon, Stabilization Company A, gave the order to fire a live Defensive Command Detonated Weapon C19, without ensuring, as it was his duty to do, that all persons were either under cover or withdrawn from the danger area.

[2] The facts and circumstances surrounding the commission of the offences for which Warrant Officer (Retired) Ravensdale was found guilty were admitted for the most part and only challenged to the extent of the role, participation and recollection of the witnesses with regard to the events that occurred at the Kan Kala range on 12 February 2010 and the preparatory events that led to that live firing range. The evidence at trial was directed, for the most part, to explain the sequence of events that occurred on 12 February 2010 at the Kan Kala range, but also to the events that led to the conduct of that range. During that period, the platoon was heavily involved in regular patrols in Kandahar City. Major Lunney, as the commander of Stab A, had given instructions to his platoon commanders, including Capt Watts, to train their soldiers on the range regularly, mostly on maintenance day. One or two weeks prior to the incident, the senior personnel of 2 Platoon had been discussing the potential scenarios and threats that they could face as they were preparing for a long range patrol in District 9, an area known for its increased level of risk. These discussions involved all sections commanders and their second in command, as well as Captain Watts and Warrant Officer (Retired) Ravensdale. As they were discussing the available options to get out of this area should they become engaged by insurgents, Sergeant McKay raised the potential use of the C19s as a final defensive posture since they were part of their weapons inventory. Warrant Officer (Retired) Ravensdale suggested that if this option could be envisaged, members of their platoon should include training on the C19s like with their other weapons. The plan was approved by Captain Watts and ultimately blessed by Major Lunney in the presence of Captain Watts and Warrant Officer (Retired) Ravensdale. Major Lunney relied on Warrant Officer (Retired) Ravensdale and he did not enquire further on this issue other than indicating to him that he expected that people would be 20-25 meters behind cover. In addition, Major Lunney knew that Captain Watts was not competent, qualified nor that he had received proper training to be an Officer in charge of Practice (OIC Practice) or a Range Safety Officer (RSO) on this type of live firing range or any range. Major Lunney relied on Warrant Officer (Retired) Ravensdale to conduct the range and on the other senior non-commissioned members of that platoon. At trial, Major Lunney said that it was his mistake not to have specifically designated different persons to act as OIC of Practice and RSO. This failure was not his only mistake in relation to the compliance of the rules set out in *Training Safety* which was filed as Exhibit 6.

[3] On 12 February 2010, the Kan Kala range was set up in three distinct areas for different weapons and weapon systems. The Light Armoured Vehicles (LAV) were in the middle of the range aligned with the front of the LAVS facing North with a mountain in the distance. The immediate area behind the LAVs was considered the administrative area. This middle range was used for the LAVs to fire their weapon systems. The range to the west (left side of the LAVS) was used to fire the heavy weapons such as the M72, M203 grenade launchers as well as the machine guns. The range located on the east side of the LAVs (right side of the LAVS) was used to practice the firing of small arms. Sergeant Collins ran the range located to the left and Sergeant Mckay was in charge of the range on the right for the small arms. The specific range for the C19s would take place after the completion of the firing at the other ranges

and it would be conducted by Warrant Officer (Retired) Ravensdale. The C19s set up and firing would take place at a distance in front of the LAVS. The C19s were placed between 25 metres and 31 metres from the firing points. The evidence established that Warrant Officer (Retired) Ravensdale gave a general briefing as to how the range at Kan Kala would be conducted and that he also provided specific briefings to those soldiers who wanted to use the C19s including the safety measures concerning this weapon, how to set them up and fire them. The C19s were fired in serials of two detonations each. Warrant Officer (Retired) Ravensdale gave the order to fire each detonation of the C19s. Corporal Brettner fired in the second position on the third serial. The videos filed in evidence as well as the testimony of the witnesses that were present at the Kan Kala range on 12 February 2010 provided an overview of where the range took place, how it was conducted and in which circumstances. The said evidence also established the position of the persons present on the range as well as their movement prior to and during the C19 range.

[4] Warrant Officer (Retired) Ravensdale was the Second in Command of 2 Platoon, Stabilization Company A (Stab A). The platoon was commanded by Captain Watts. As such, Warrant Officer (Retired) Ravensdale was under the command of Captain Watts. The Officer Commanding Stab A was Major, now Captain, Lunney. Stab A was a subunit of the Kandahar Provincial Reconstruction Team, Task Force 3-09, and was based at Camp Nathan Smith in Kandahar, Afghanistan. The Acting Company Sergeant Major of Stab A was Warrant Officer Smith. On 12 February 2010, 2 Platoon conducted a range practice at Kan Kala, Afghanistan (located northeast of Kandahar City). A number of weapons were used by 2 Platoon at that range practice including the following: the general purpose machine gun 7.62 mm C6; the rifle 5.56 mm C7; the carbine 5.56 mm C8; the light machine gun 5.56 mm C9; the 9 mm pistol; the rocket, high explosive, 66 mm, NM 72 E5 (M72); the M203 grenade launcher; and the 76 mm smoke grenade. Another weapon used by 2 Platoon during that practice was the Defensive Command Detonated Weapon C19 (C19). During the third serial of the C19 firing range, the second detonation was fired by Corporal Brettner and it caused projectiles to spread backwards. Projectiles from Corporal Brettner's C19 struck several members of 2 Platoon, causing the death of one member and bodily harm to four others. In particular:

(a) Corporal Joshua Baker was struck by four (4) projectiles, which resulted in his death shortly after his arrival at the Role 3 hospital at Kandahar Airfield. A post-mortem examination attributed his death to a penetrating wound to the chest caused by one of the projectiles;

(b) Bombardier Daniel Scott was struck in the left lower chest by a single projectile. As a result, he underwent a splenectomy (surgical excision of the spleen), a nephrectomy (surgical removal of a kidney) and removal of the tail of the pancreas;

(c) Sergeant McKay received two (2) puncture wounds over his anterior and lateral mid-thigh;

(d) Master Corporal William Pylypow suffered two (2) through-and-through soft tissue injuries to the right upper arm; and

(e) Corporal Brettner was struck in the right forearm. His ulna was fractured.

[5] Before deploying to Afghanistan, all members of Stab A had completed all mandated "Individual Battle Task Standards" and collective training requirements and had been validated and declared operationally ready for deployment. It is important to note that the C19 weapon system was not included in the pre-deployment training. Warrant Officer (Retired) Ravensdale did not participate in the pre-deployment training received by the members of Task Force 3-09 and he was not deployed with them in September 2009. He was only deployed in January 2010 to replace the second in command of 2 Platoon, Stab A, who had been repatriated to Canada, along with other members of the platoon, after they suffered injuries in December 2009.

[6] It was admitted that the publication B-GL-381-001/TS-000 – *Operational Training: Training Safety* (*Training Safety*), at Exhibit 6, which governs the use of weapons and conduct of ranges in the Canadian Forces, could be accessed by Major Lunney, Captain Watts and Warrant Officer (Retired) Ravensdale throughout their tour in Afghanistan. During the trial, the defence made further admissions in writing. These admissions covered the methods that are used to instruct members of the Canadian Army at the Infantry School on the use and handling of weapons, including the Defensive Command Detonated Weapon C19. The admissions also covered the content of the course that lead to the qualification code "AACA" awarded to individuals who successfully complete the Development Period (DP) 3A Infantry Small Arms Instructor Course (formerly known as the Qualification Level 6A Infantry Section Commander's Qualification). They also described the required Performance Objectives (POs) that are taught on that course. Finally, the defence had admitted that Warrant Officer (Retired) Ravensdale had earned the qualification "AACA" and that he was trained according to the requirements leading to the qualification.

[7] Most of the witnesses testified as to what happened on the range on 12 February 2010. They described the general layout of the range that took place in a desert surrounded by a mountain to the north as well as some smaller hills around it. They also testified that some local Afghans could be observed from a distance overlooking at the troops on the range and they described how they felt about the presence of these people. The firing at all three ranges was conducted in the north direction and the participants moved freely from one side of the range to the other following an imaginary lane behind the LAVs. It is obvious that several members of the unit were well within the 100 meters area of risk described in *Training Safety* behind the C19 firing point.

[8] The prosecution submits that a fit sentence in this case is imprisonment for a period of 4 years. It is also argued that the punishment of imprisonment should not be

suspended as this measure would be contrary to the public interest and that it would bring the administration of military justice into disrepute. In addition, the prosecution seeks a weapons prohibition order for a period of 10 years for any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition and explosive substance; and for life with regard to any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition. Finally, the prosecution asks the court to impose a DNA order because it is mandatory under the applicable provisions of the *National Defence Act*. The prosecution submits that the sentence to be imposed on Warrant Officer (Retired) Ravensdale must emphasize the principles of denunciation, general deterrence and retribution. It is argued that the facts in this case show that the offender was in a position of trust and that soldiers under his command had the right to assume that their safety was not at risk. The prosecution submits that the safety briefings were awfully inadequate and Warrant Officer (Retired) Ravensdale was the most directly involved in the preparation and conduct of the live firing range at Kan Kala on 12 February 2010. The prosecution also submits that the findings made in this case are far more serious than those in the courts martial of Major Lunney and Captain Watts, therefore their sentences are of little relevance as the sentencing principle of parity would not apply in this case. The prosecution noted that there is no sentencing precedent for cases dealing with a contravention of section 80 of the *Criminal Code* and it suggests that cases dealing with dangerous driving offences causing death may assist the court in determining a fit sentence. Finally, the prosecution points to some factors that they consider to be seriously aggravating in the circumstances, namely: 1. the fact that the negligence was of a long duration; 2. the offences were committed in an operational theatre; 3. the offender was in a position of trust; and, 4. the pain and suffering of the victims described during the trial and during the sentencing hearing.

[9] The defence recommends that the court impose the punishment of reduction in rank accompanied by a severe reprimand. It's also recommended that, should the court conclude otherwise, the punishment of imprisonment should not exceed 30 days. Its execution should be suspended. The defence submits that the principle of parity applies in the circumstances and that the sentences imposed on Lunney and Watts are extremely relevant, particularly in assessing the level of moral blameworthiness of the offender. In support of its recommendation, the defence points to the diagnosis and ongoing treatment of the offender with regard to Post Traumatic Stress Disorder that is related to the events that occurred in Afghanistan in 2008 where Warrant Officer (Retired) Ravensdale lost friends during his first tour in that country, but also to those events that lead to this court martial. In addition, the defence refers to the exemplary career of the offender until his release from the Canadian Forces.

[10] I must now determine what shall be an appropriate, fair and just sentence. In the context of sentencing an offender under the Code of Service Discipline, the Court Martial Appeal Court has expressly stated that a court martial should guide itself with the appropriate sentencing purposes, principles and objectives, including those enunciated in sections 718.1 and 718.2 of the *Criminal Code*. The fundamental purpose of sentencing at court martial is to contribute to the respect of the law and the

maintenance of military discipline by imposing punishments that meet one or more of the following objectives: to denounce the unlawful conduct; to deter the offender but also others who might be tempted to commit such offences; to separate offenders from society, where necessary; to provide reparations for harm done to the victims or to the community; to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community; and, the reformation and rehabilitation of the offender (section 718 *Criminal Code*).

[11] The sentence must also take into consideration the following principles. The sentence must be commensurate with the gravity of the offence, the previous character of the offender and his/her degree of responsibility. It should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. A court must also respect the principle that an offender should not be deprived of liberty if less restrictive punishments may be appropriate in the circumstances. In other words, punishments in the form of incarceration should be used as a last resort. Finally, the sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. However, the court must act with restraint in determining sentence in imposing such punishment that should be the minimum necessary intervention to maintain discipline. It must be emphasized that sentencing in Canada is an individualized process.

[12] In determining sentence, I shall accept as proven all facts, express or implied, that are essential to the court martial panel's findings of guilty with respect to the second, third, fourth and fifth charges. I have also considered the facts of the case as disclosed in the evidence heard during the trial and the other evidence and materials submitted at the sentencing hearing, as well as the submissions of counsel for the prosecution and for the defence. I have carefully reviewed the evidence of Mrs Middleton and Baker, Lieutenant-Colonel Prendergast, Mr Ellis, Warrant Officer (Retired) Ravensdale and Dr Walsh. Finally, I took into consideration the indirect consequences of the findings and of the sentence that I consider fair, just and appropriate.

[13] Sentencing is often a very difficult exercise for any trial judge, even more so in cases of penal negligence leading to fatal consequences regardless of the degree of fault displayed by the persons involved in the events. Assessing moral blameworthiness in a case like this one is one of the key factors that must guide the determination of sentence. I believe that a fit and just sentence in this case shall emphasize the principles of general deterrence, denunciation and rehabilitation. It is also of the outmost importance that the court clearly respects the fundamental principle of proportionality in achieving that sentence.

[14] After a thorough review of the cases submitted by the prosecution dealing with dangerous driving of motor vehicles, I find them of little assistance in determining a fit and proper sentence in this case, especially with regard to their suggested relevance in the context of convictions for breach of duty in relation to explosives under section 80 of the *Criminal Code*, which require a marked departure from the standard of care from

the conduct of a reasonable person in the same circumstances. I agree with my colleague Lamont M.J. in *R v Watts*, 2013 CM 2006, at paragraphs 21 to 25, that the cases of *Paik, Ives, Hirter, Boland* and *Seward* are more relevant, even if *Hirter* had not been charged with regard to the death of Corporal MacKinnon but convicted of Negligent Performance of Duties under section 124 of the *National Defence Act*:

> [21] I have concluded that the sentencing position of the prosecution is too severe and for two main reasons. In the first place, the case authorities to which I was referred by counsel for the prosecution do not support a disposition by way of imprisonment. In the case of *R v Major Paik*, a sentence of reduction in rank to lieutenant and a severe reprimand was imposed upon the offender for one charge of negligent performance of a military duty arising out of the death by electrocution of a soldier while constructing a shed in Bosnia. The offender made several errors of judgment that exposed the soldier to what was described as an obvious safety hazard. His subordinate, Captain Ives, pleaded guilty to one offence of negligent performance of a military duty arising out of the same incident. His conduct was said to be a contributing but not the sole cause of the death, and the degree of his negligence could not be described as borderline or minimal. He was sentenced to reduction in rank to lieutenant, a severe reprimand and a fine of $3000.
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> [22] In the case of Major Hirter, the offender was found guilty of three offences of negligent performance of a military duty and one offence of conduct to the prejudice of good order and discipline arising out of an improperly conducted live fire range practice that resulted in the death of a soldier. Major Hirter was sentenced to reduction in rank to captain and a severe reprimand and on appeal to the Court Martial Appeal Court, the sentence was affirmed. While other case authorities from civilian courts dealing with the sentencing for various kinds of negligence offences were also submitted, I do not find those cases particularly helpful in arriving at a sentence in this case.
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> [23] I have also considered two case authorities from the Court Martial Appeal Court that were not referred to by either counsel. Both arose out of the torture and death of a Somali civilian who was taken into the custody of Canadian soldiers in March of 1993 during Operation Deliverance. Sergeant Boland was the section commander who failed to prevent the mistreatment of the prisoner in his presence by soldiers in his section. He pleaded guilty to one offence of negligent performance of a military duty and his sentence of 90 days' imprisonment, imposed by a General Court Martial, was raised to twelve months' imprisonment on the appeal of the prosecution to the Court Martial Appeal Court (CMAC-374, decided May 16, 1995).
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> [24] In a related case, Major Seward gave the order that prisoners could be abused that resulted in a general breakdown of discipline, culminating in the ...

[15] There is no doubt that the offence of Breach of Duty under section 80 of the *Criminal Code* is a very serious offence. A person found guilty is liable to imprisonment for life when it caused death or likely to cause death to a person and to fourteen years imprisonment when it caused bodily harm or likely to cause bodily harm or damage to property. The objective gravity of this offence, which is rarely used in Canadian criminal law, is linked to the consequence of the offender's failure in the discharge of his or her legal duty to use reasonable care to prevent bodily harm or death or damage to property by an explosive substance under his or her care and control. Obviously, this offence contemplates the mishandling of explosives in the civilian context, but not exclusively as it is punishable under section 130 of the *National Defence Act*, for example the demolition of a building using explosives. The legislator

has left the appreciation of other sentencing factors and principles to the courts, including the gravamen related to the offence.

[16] In the military context, the same legislator has adopted a different approach in dealing with the injurious or destructive handling of dangerous substances, including explosives. Section 127 of the *National Defence Act* provides:

> **127.** Every person who wilfully or negligently or by neglect of or contrary to regulations, orders or instructions does any act or omits to do anything, in relation to any thing or substance that may be dangerous to life or property, which act or omission causes or is likely to cause loss of life or bodily injury to any person or damage to or destruction of any property, is guilty of an offence and on conviction, if he acted wilfully, is liable to imprisonment for life or to less punishment and, in any other case, is liable to imprisonment for less than two years or to less punishment.

[17] This service offence is as objectively serious as the offence of Breach of Duty under section 80 of the *Criminal Code*. However, the legislator has provided additional elements to assist service tribunals in the determination of an appropriate sentence by providing a contextual element with regard to the moral blameworthiness of the accused as well as to the nature of the act, conduct or omission. There is no legal principle that would prevent this court to adopt the contextual approach adopted by the legislator in section 127 of the *National Defence Act* in assessing the objective seriousness of theses offences in the case at bar. Nevertheless, the court is aware that section 80 of the *Code* does not create a distinction of the same nature.

[18] It is of interest to mention that notes A to D to article 112.59 (*Negligent Handling of Dangerous Substances*) of the *Queen's Regulations and Orders for the Canadian Forces* were added to provide guidance with regard to the laying of a charge under section 127 of the *National Defence Act*. I find that they capture the essence of the duty breached by the accused when he had the care and control of the C19s at the Kan Kala range on 12 February 2010. These notes read as follows:

> (A) Section 127 of the *National Defence Act* is designed to provide suitably for offences in relation to modern materials of war which inherently are so dangerous that an extreme degree of care in their handling is required. Responsibility is not dependent upon whether the accused intended the actual consequences which his wrong-doing produced.
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> (B) The word "wilfully" in section 127 of the *National Defence Act* signifies that the alleged offender knew what he was doing, intended to do what he did, and was not acting under compulsion.
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> (C) The word "negligently" in section 127 of the *National Defence Act* signifies that the alleged offender either did something or omitted to do something in a manner which would not have been adopted by a reasonably capable and careful person in his position in the Service under similar circumstances.
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> (D) The expression "any person" as used in section 127 of the *National Defence Act* includes the accused.

[19] I stated earlier that the prosecution sought a sentence that will emphasize the principles of denunciation, general deterrence and retribution. In addition, the prosecution argued that the sentences imposed on Major Lunney and Captain Watts for their role in the events that took place at the Kan Kala range on 12 February 2010 were not relevant because the principle of parity does not apply in the determination of a fit and proper sentence for Warrant Officer (Retired) Ravensdale. Before embarking on the review of the aggravating and mitigating factors relating to the offences and to the offender, it is appropriate to examine the application of the other sentencing principles in the context of this case.

[20] Albeit the fundamental purpose of sentencing at court martial is to contribute to the respect of the law and the maintenance of military discipline, the fundamental principle requires that a sentence must be proportionate to the gravity of the offence and to the degree of responsibility of the offender (section 718.1 of the *Criminal Code*).

[21] In *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206, the Supreme Court recently took the opportunity to remind us of the meaning of proportionality in the context of the other principles of sentencing as well as the approached to be followed by trial judges in this process, at paragraphs 40-44:

> [40] The objectives of sentencing are given sharper focus in s. 718.1, which mandates that a sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender". Thus, whatever weight a judge may wish to accord to the objectives listed above, the resulting sentence *must* respect the fundamental principle of proportionality. Section 718.2 provides a non-exhaustive list of secondary sentencing principles, including the consideration of aggravating and mitigating circumstances, the principles of parity and totality, and the instruction to consider "all available sanctions other than imprisonment that are reasonable in the circumstances", with particular attention paid to the circumstances of aboriginal offenders.
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> [41] It is clear from these provisions that the principle of proportionality is central to the sentencing process (*R. v Solowan*, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12). This emphasis was not borne of the 1996 amendments to the *Code* but, rather, reflects its long history as a guiding principle in sentencing (e.g. *R v Wilmott* (1966), 58 D.L.R. (2d) 33 (Ont. C.A.)). It has a constitutional dimension, in that s. 12 of the *Charter* forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. But what does proportionality mean in the context of sentencing?
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> [42] For one, it requires that a sentence not *exceed* what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the "just deserts" philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused (*R. v M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 533-34, *per* Wilson J., concurring). Understood in this latter sense, sentencing is a form of judicial and social censure (J.V. Roberts and D.P. Cole, "Introduction to Sentencing and Parole", in Roberts and Cole, eds., *Making Sense of Sentencing* (1999), 3, at p. 10). Whatever the rationale for proportionality, however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The

> two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.
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> [43] The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v Lyons*, [1987] 2 S.C.R. 309; *M. (C.A.)*; *R. v Hamilton* (2004), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the *Code* and in the case law.
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> [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[22] The fundamental principle of proportionality is of the outmost importance in this case because of the respective role and level of responsibility of the various individuals directly or indirectly involved in the events that led to the conduct of the Kan Kala range on 12 February 2010 and in the conduct of the range itself. Retribution can not be confused with vengeance. In *M. (C.A.)*, [1996] 1 SCR 500, 105 CCC (3d) 327 (SCC), the late Chief Justice Lamer provided the meaning of retribution and how it should be distinguished from the principle of denunciation, at pages 368 and 369:

> [80] However, the meaning of retribution is deserving of some clarification. The legitimacy of retribution as a principle of sentencing has often been questioned as a result of its unfortunate association with "vengeance" in common parlance: ... But it should be clear from my foregoing discussion that retribution bears little relation to vengeance, and I attribute much of the criticism of retribution as a principle to this confusion. As both academic and judicial commentators have noted, vengeance has no role to play in a civilized system of sentencing: see Ruby, Sentencing, supra, at p. 13. Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more. As R. Cross has noted in The English Sentencing System, 2nd ed.

> (London: Butterworths, 1975), at p. 121: "The retributivist insists that the punishment must not be disproportionate to the offender's deserts."
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> [81] Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. As Lord Justice Lawton stated in *R v Sargeant* (1974), 60 Cr. App. R. 74 at p. 77: "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass." The relevance of both retribution and denunciation as goals of sentencing underscores that our criminal justice system is not simply a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the offender must bear in committing an enumerated offence. Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the Criminal Code.

[23] In *R v Major Lunney*, 2012 CM 2012, delivered on 13 September 2012, the offender entered a plea of guilty to one count of Negligently Performed a Military Duty under section 124 of the *National Defence Act* where the particulars alleged that on or about 12 February 2010, at or near Kan Kala, Afghanistan, whilst commanding Stabilization Company A, permitted his subordinates to fire the Defensive Command Detonated Weapon C19 on a range without ensuring, as it was his duty to do so, that the range was conducted under the command and control of a qualified Officer in Charge of Practice. All other charges on the charge sheet were withdrawn by the prosecution. The prosecution and defence joined their voice and recommended a sentence of reduction in rank to the rank of captain and a severe reprimand. Lamont M.J. accepted the joint submission on the basis of the following facts provided to him during the sentencing hearing, at paragraphs 8 to 12:

> [8] The facts and circumstances surrounding the commission of the offence are as straight forward and uncomplicated as they are tragic. They are set out in detail in Exhibit 6, the Statement of Circumstances. In summary, as the Officer Commanding Stabilisation Company A, part of the Kandahar Provincial Reconstruction Team at Camp Nathan Smith in Kandahar, Afghanistan, Major Lunney was in charge of four platoons of soldiers. On his orders, the four platoon commanders conducted range practices for their platoons on a monthly basis. On these occasions, each platoon commander acted as the Officer in Charge Practice, or OIC Practice.
>
> [9] Approximately a week prior to 12 February 2010, the date alleged in the charge, the commander of 2 Platoon sought and was granted permission by Major Lunney to fire a DCDW C19 command detonated, anti-personnel mine, often referred to as a "Claymore", on a platoon range near Kan Kala, northeast of Kandahar.
>
> [10] On the date alleged, Major Lunney was present for the range practice. When 2 Platoon commenced the DCDW C19 range, fragments from a DCDW C19 struck several members of 2 Platoon, killing Corporal Joshua Baker and injuring four other members of

> the platoon. A publication, issued on the authority of the Chief of the Land Staff and readily available to users of the computerized Defence Information Network, including Major Lunney, called the "Operational Training – Training Safety", states among its principles:
>
> > "Weapons and weapons systems shall NEVER be placed in charge of personnel who are not qualified on the weapon or the weapon system except for the purpose of safeguard, transport or storage."
>
> [11] The publication goes on to state the qualifications to be appointed an OIC Practice for a specific range, stating:
>
> > "To be qualified for appointment as an OIC Practice ... a person must:
> >
> > a. be qualified on the weapon or weapons systems being used in the exercise by virtue of either a formal CF course or a combination of unit training and experience that meets with the approval of the CO of the unit."
>
> And the appointment is to be notified in orders.
>
> [12] The commander 2 Platoon was neither qualified nor experienced with the DCDW C19. He had not been appointed as an OIC Practice and could not have been so appointed by Major Lunney. Major Lunney mistakenly believed that the commander 2 Platoon was qualified to act as OIC Practice for the DCDW C19 range because of his position and rank; however, Major Lunney did not verify what qualifications were necessary by reference to the training safety publication, nor did he verify the qualifications of his subordinate, the commander 2 Platoon.

[24] In *Major Watts*, 2013 CM 2006, delivered on 20 February 2013, the offender was sentenced to reduction in rank to the rank of lieutenant and to a severe reprimand. The panel of the General Court Martial had made findings of guilty against him on three charges as follows:

(a) unlawfully causing bodily harm contrary to section 269 of the *Criminal Code*. In that he, on or about 12 February 2010, at or near Kan Kala, Afghanistan, while commanding 2 Platoon, Stabilization Company A, did unlawfully cause bodily harm to Sergeant Mark McKay, Master Corporal William Pylypow, Corporal Wolfgang Brettner and Bombardier Daniel Scott;

(b) and two charges of negligently performing a military duty imposed upon him. In that, at the same time, while present during a range practice being conducted by his subordinates, he failed to order a stop to the live firing of the Defensive Command Detonated Weapon C19, as it was his duty to do, until all of his subordinates were either under cover or withdrawn from the danger area;

(c) and secondly, he permitted his subordinates to train on the live Defensive Command Detonated Weapon C19 without ensuring, as it was his duty

> to do, that training on inert or practice weapon systems had first been successfully completed.

[25] Watts had been acquitted on three other charges: a charge of manslaughter in relation to the death of Corporal Joshua Baker; and two charges of breach of duty in relation to explosives contrary to section 80 of the *Criminal Code*. It is of little or no surprise that the facts expressly considered by Lamont M.J. in determining sentence in the case of Watts are strikingly similar to the facts relied upon by this court to determine a fit and proper sentence for Warrant Officer (Retired) Ravensdale. In *Watts*, my colleague Lamont M.J. made comments with regard to the principle of parity. At paragraph 29, he stated:

> [29] Since the offences of both Major Lunney and Major Watts arise out of the same facts, there are, of course, some similarities. Both officers are guilty of negligence offences committed in connection with weapons range training in an operational context that resulted in serious consequences. But there are also important differences between the cases of Major Lunney and Major Watts. Major Lunney pleaded guilty to one charge only, whereas Major Watts was found guilty after trial of two offences of negligence and a charge of unlawfully causing bodily harm to four soldiers as a result of his negligence. Both officers were on-site at the time of the range practice, although for different purposes. Major Lunney was there to exercise the members of his staff and, although he out-ranked him, he correctly sought permission from a senior non-commissioned member before going live. Major Watts, on the other hand, was directly responsible for the safety of all of the soldiers in his platoon, whether Major Lunney was present or not. Nevertheless, I am not persuaded that the differences between the cases of Major Lunney and Major Watts support the wide disparity in sentencing treatment that would justify incarceration in the case of Major Watts.

[26] My understanding of the reasons provided by the presiding judge in *Watts* leads me to conclude that he was simply not prepared to follow the prosecutorial approach because he considered the sentencing position of the prosecution to be inconsistent with the position taken by the prosecution in the case of *Major Lunney*, where they each shared significant level of responsibility for the events that led to the Kan Kala range and the consequences that resulted. His reasons, I suggest, were not addressed as to the application of the principle of parity in the circumstances.

[27] The principle of parity is aimed at ensuring that similar sentences should be imposed on similar offenders for similar offences committed in similar circumstances. Of course, the individualized process of sentencing makes it difficult to apply it on a case-by-case basis. The rationale for the rule is, to the extent possible, that convicted persons must not be left with a sense of injustice or grievance as a result of disparate sentences (Ruby, Clayton C., Gerald J. Chan and Nader R. Hasan. *Sentencing*, 8th ed. Markham, Ont.: LexisNexis, 2012, at s. 2.30). This principle is mostly applied in the negative and it is not absolute. I agree with counsel for the prosecution that this principle does not apply in the context of sentencing Warrant Officer (Retired) Ravensdale with regard to the sentences imposed in the cases of *Lunney* and *Watts*, because they were convicted on different offences and that, for those identical offences for which they were convicted, their respective role differed. However, their respective role and responsibilities in the totality of the circumstances of the Kan Kala range on 12

February 2010, including the events preceding the planning and the conduct of the range, are crucial to the application of the fundamental principle that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. At the end, the totality of the circumstances must reveal the level of moral blameworthiness of the offender and of others, if not the sole participant in the sequence of events for which he was held accountable. Proportionality will ensure that an offender's sentence will be equivalent to his or her moral culpability, and not greater than it.

[28] I stated earlier that Warrant Officer (Retired) Ravensdale had not participated in the pre-deployment training of that unit, but he had served in Afghanistan in 2008. The evidence at trial clearly revealed that there was no formal or informal training provided to the troops on the C19s during the pre-deployment training phase of Task Force 3-09 in Canada. Major Lunney and Captain Watts were aware of that fact as well as every senior non-commissioned officer of Task Force 3-09 who had participated in the pre-deployment training. At trial, the evidence revealed that the members of 2 Platoon had various levels of knowledge of that specific weapon, depending on their trade and their level of experience, from none to being familiar with it. There is no evidence that Warrant Officer (Retired) Ravensdale had been made aware by his chain of command of the level of expertise, or lack thereof, of his troops with regard to the C19 weapon. Nevertheless, the C19s were part of their weapons inventory in Afghanistan.

[29] Major Lunney admitted his failure in not designating a separate OIC and RSO to conduct the range at Kan Kala, as required by *Training Safety* (Exhibit 6). In addition, Major Lunney knew that Captain Watts was not qualified or competent to be an OIC (Officer in charge of Practice) or a RSO (Range Safety Officer) on this type of live firing range or any range. As I said earlier, Major Lunney relied on Warrant Officer (Retired) Ravensdale to conduct the range and on the other senior non-commissioned officers of that platoon after he had approved with full knowledge and understanding, the training exercise submitted by Captain Watts and Warrant Officer (Retired) Ravensdale. The technical mistake for which Major Lunney pleaded guilty at a court martial does not capture the extent of his overall responsibility and moral blameworthiness in the overall circumstances of the Kan Kala range on 12 February 2010. Despite his knowledge of the absence of specific training received by his troops on the C19 weapon system during the pre-deployment phase and his knowledge of the competence of his platoon commander in relation to that specific weapon and more generally with his ability to act as an OIC or RSO at any given firing range, he deliberately chose to rely exclusively on Warrant Officer (Retired) Ravensdale to conduct the range and on the other senior non-commissioned officers of that platoon without enquiring any further. He approved the concept of operations of the range and its purpose. While the range was conducted, Major Lunney felt that it was run effectively and that Warrant Officer (Retired) Ravensdale was in positive control of the said range.

[30] Despite the fact that he had not been designated as the OIC of Practice by Major Lunney for the range at Kan Kala, Captain Watts was nevertheless directly responsible

for the safety of all of the soldiers in his platoon that day. He could not abdicate his overall responsibility and transfer it over to Warrant Officer (Retired) Ravensdale and act as a trainee like any member of the platoon. This range was conducted in a zone of combat, which was known by everyone involved as a legacy minefield. Witnesses testified to the presence of Afghan males on the hills surrounding the range when they started to conduct the live firing exercise. This was not a live firing range conducted in total isolation. Major Lunney considered that all the moves to Kan Kala were considered as a combat operation and he expected his soldiers to act on that range with regard to their personal weapons, in the same fashion as if they were facing an immediate threat. This caveat equally applied to Captain Watts in fulfilling his overall duties at the range. In assessing the moral blameworthiness of Warrant Officer (Retired) Ravensdale, it is important to highlight the overall responsibilities of Major Lunney and Captain Watts in the totality of the circumstances and the higher standard of care expected of them as commanders when they fulfilled their military duties. Finally, it is relevant to assess the overall context to determine whether their failure in meeting their own responsibilities contributed to the tragic events that ensued and to what extent.

[31] In *R v Major A.G. Seward*, CMAC 376, 5 CMAC, the Court Martial Appeal Court dealt with an appeal by the Crown of a sentence imposed by a General Court Martial following the respondent's conviction under section 124 of the *National Defence Act* for negligence performance of a military duty imposed on him. The facts led to the abuse and death of a young Somali prisoner as a result of the comments of Major Seward during an Orders Group to the effect that the patrols were to capture infiltrators and that as part of that task, they could abuse them. Strayer C.J., as he then was, made the following remarks, at pages 454-455:

> I have concluded that the sentence of a severe reprimand should be set aside because it is not a fit sentence. It is clearly unreasonable and clearly inadequate on the facts which the General Court Martial must be taken to have found, on facts which were amply proven but not referred to in the faulty instruction by the Judge Advocate, and on the criteria which were or should have been put before the panel by the Judge Advocate. To reiterate, the panel found him guilty of negligently performing a military duty as particularized in count 2 namely:
>
> > ... that he ... by issuing an instruction to his subordinates that prisoners could be abused, failed to properly exercise command over his subordinates, as it was his duty to do.
>
> In a passage frequently quoted by military lawyers, Lamer C.J.C. in *R v Genereux* said:
>
> > To maintain the armed forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. 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*. (Emphasis added).
>
> I think it is fair to assume that in any well-run civilian organisation an order given by a mid-level executive, leading to such disastrous consequences for his subordinates and the organisation, would rate more than a negative comment in his personnel file, the equivalent of a "severe reprimand".

> The Crown asked at trial for a sentence including dismissal with disgrace and a "short period of imprisonment commensurate with the gravity of [the] offence". While its factum filed in this Court proposed an increase of sentence from severe reprimand to that of dismissal from Her Majesty's service, at the hearing of the appeal Crown counsel said that the sentence should instead be increased further to dismissal with disgrace, which is the maximum sentence provided under section 124. As noted earlier we ensured that counsel had a further opportunity, in response to our questions, to react to the possibility of the maximum sentence being imposed or some lesser sentence which would still represent an increase.
>
> After considering all the submissions, I have concluded that an appropriate sentence would be a short term of imprisonment which I would fix at three months together with dismissal from Her Majesty's Service. This is not the maximum sentence, as called for by the Crown, of dismissal with disgrace, nor is it the maximum term of imprisonment possible for this offence which could be any term for less than two years. I believe this falls within the acceptable range of sentences, having particular regard to the sentence imposed on Boland by this Court of one year imprisonment. Certainly a severe reprimand as imposed by the General Court Martial does not fall within such a range when one considers the perilous circumstances in which this relatively senior officer deliberately pronounced what was an ambiguous, and a dangerously ambiguous, order. He not only pronounced it but essentially repeated it when questioned as to his meaning. While it was found that he had no direct personal connection with the beating and death of Arone, unlike Boland's proximity and means of knowledge of what was likely to occur, Seward was of a much superior rank as an officer and commander of the whole of 2 Commando. His education, training, and experience and his much greater responsibilities as commanding officer put on him a higher standard of care, a standard which he did not meet.
>
> While I recognize from the evidence before the court martial that 2 Commando was working under great difficulties, those difficulties did not include active warfare. Nothing suggests that the infiltrator problem represented any serious threat to the lives or security of Major Seward's unit. What the evidence did show was the existence of a difficult situation for the maintenance of morale and discipline in which the giving of orders required particular care. Any sentence must provide a deterrent to such careless conduct by commanding officers which in the final analysis is a failure in meeting their responsibilities both to their troops and to Canada.

[32] After analysis, I conclude that the evidence at trial clearly establishes that Major Lunney and Captain Watts share a high level of responsibility for the events that lead to the death and injuries of soldiers at the Kan Kala range on 12 February 2010 that contributes to diminish the overall moral blameworthiness of Warrant Officer (Retired) Ravensdale in the circumstances. The fact that his chain of command abdicated its responsibility in making him the overall person in charge to conduct the range and the mere fact that he was the person most proximate to the offence does not impose on him a higher level of responsibility. Warrant Officer (Retired) Ravensdale should not have been put in this specific situation in the first place. However, this cannot serve to negate his own responsibility for his own failures that flow from the findings of guilt made by the panel. The moral blameworthiness of the offender must be assessed in its proper context.

[33] As found by Strayer C.J. in *Seward*, I conclude that a sentence short of one that includes the punishment of imprisonment is not a fit sentence to reflect both the level of moral blameworthiness of Warrant Officer (Retired) Ravensdale and the gravity of the offences for which he was found guilty, even if the court adopts the approach in section 127 of the *National Defence Act* with regard to the objective seriousness of the offence. In penal negligence, the level of moral blameworthiness may vary depending on the nature of the activity. As stated by McLaughlin J, as she then was, speaking for herself and three concurring justices in *R v Creighton* [1993] 3 SCR 3, at 69-70:

> […] In unregulated activities, ordinary common sense is usually sufficient to permit anyone who directs his or her mind to the risk of the danger inherent in an activity to appreciate that risk and act accordingly -- be the activity bottle throwing (as in *R v De Sousa*) or a barroom brawl. In many licensed activities, such as driving motor vehicles, there must be a basic amount of knowledge and experience before permission to engage in that activity will be granted (see *R v Hundal*). Where individuals engage in activities for which they lack sufficient knowledge, experience or physical ability, they may be properly found to be at fault, not so much for their inability to properly carry out the activity, but for their decision to attempt the activity without having accounted for their deficiencies. The law expects people embarking on hazardous activities to ask questions or seek help before they venture beyond their depth. Thus, even the inexperienced defendant may be properly found to be morally blameworthy for having embarked upon a dangerous venture without taking the trouble to properly inform himself or herself.

[34] Accepting as proven the facts, expressed or implied, essential to the findings made by the panel, the cause of the C19 weapon firing backwards after being detonated by Corporal Brettner is unknown. However, Warrant Officer (Retired) Ravensdale had not consulted the manual *Training Safety* (Exhibit 6) prior to the conduct of the range, as he should have done. The conduct of firing ranges or conducting ranges is a heavily regulated activity in the Canadian Forces. The mere fact that the offender thought he knew what he was doing is insufficient. As revealed by the evidence, should the proper procedure prescribed in *Training Safety* been followed, a multitude of checks and balances would have been put in place before the range, including the designation of a competent OIC of Practice. Obviously, when Warrant Officer (Retired) Ravensdale gave his directives that he was about to start the C19 firing exercise, it was not heard by everyone present or it was ignored. For example, some persons continued to pick-up debris on the small arms range when the C19s were being fired. Some were walking behind the line of LAVs, paying more or less attention to the situation, according to their own interpretation of the safety briefings or in direct violation of them. Others were on top of their vehicles within meters of Warrant Officer (Retired) Ravensdale. It appears that people were not sufficiently focused on the immediate situation and sensitive to the inherent danger involved. Warrant Officer (Retired) Ravensdale ignored or underestimated that fact. However, the court accepts that he had also to concentrate his efforts on the persons that would fire the C19s, but he had the obligation to seek help before going any further and ensure that safety would be enforced by others, including Captain Watts and the Assistant RSOs on that range, namely Sergeant Collins and Sergeant Mckay. Warrant Officer (Retired) Ravensdale set himself up for failure. Responsibility is not limited to those persons. Nobody should downplay that safety responsibility is everyone's duty on a firing range. *Training Safety* (Exhibit 6) provides a clear and strong statement to that effect at page 1-22:

> **55. All ranks**. Safety responsibilities do not end with the appointment of various safety officers and their assistants. Every serviceperson present on a range or in a training area must manifest itself with smart and efficient weapon and equipment handling drills and attention to, and the proper execution of orders, instructions in the course of the range practice or training activity. Finally, every serviceperson present must be continuously alert to safety hazards, taking corrective action as appropriate or reporting the hazard to their immediate superiors. If necessary, they will stop the training activity or cease firing.

[35] Let me briefly addressed two other predominant principles of sentencing that apply to this case, namely general deterrence and denunciation. It is an error in law to consider that the principle of general deterrence can only be achieved by imposing lengthy period of incarceration. As to the principle of denunciation, it cannot be applied in a factual vacuum. It can only be assessed on the particular circumstances of the case. Moreover, the court must assess whether any adverse effect that a denunciatory sentence would have on the rehabilitation or deterrence of the offender (Ruby, *Sentencing*, 8th edition, at s. 1.20).

[36] I now turn to the specific aggravating and mitigating circumstances of this case beyond the elements that are generally related to the gravity of the offences and the moral blameworthiness of the offender. The offences under sections 80 and 269 of the *Criminal Code* are respectively punishable to a maximum period of imprisonment for life and imprisonment for a term not exceeding ten years; whereas, a person found guilty of an offence under section 124 of the *National Defence Act* is liable to Dismissal with disgrace from Her Majesty's Service or to less punishment. These offences are very serious.

[37] The court considers the following elements to be aggravating factors in the circumstances of this case:

(a) <u>The negligence of the offender occurred over a substantial period of time</u>: The offender failed to consult the relevant publications before and during the planning of the live firing range that included the C19 weapon system. He had at least a full week to comply with his duties as the person in charge of that portion of the range. As the person designated to conduct the C19 range, he had ample time to review the applicable material and provide a safer environment on that range not only for those who would be firing the C19, but for the others as well. The fact that he thought he knew what he was doing serves to highlight that the situation was taken too lightly. Even a brief look at *Training Safety* would have clearly highlighted that additional steps were required, including a change of the original plan;

(b) The offender was in a position of trust to ensure the safety of the participants: Warrant Officer (Retired) Ravensdale was not only there to ensure the safety of the persons firing the C19s. He had also a duty to protect the safety of all personnel. It was his mistake to rely on others, including Captain Watts, by assuming that they would be doing what was expected of them in the circumstances. The general behaviour of personnel that he could readily observe, had he paid sufficient attention to details, showed a lack of awareness of the danger. He had to make sure that everyone obeyed his directives the way he meant them. However, the court agrees that he was left alone by his chain of command and that he was placed in a terrible situation. As this range was a complex range, it must be emphasized that *Training Safety* provides clearly that the RSO shall not be involved in any tasks other than those of safety; and

(c) The effect of the offences on the victims: The testimonies of Mrs Middleton and Baker leave no doubt that the death of Corporal Baker as a result of the fatal explosion left his family in severe pain. As it was mentioned by his former commanding officer, Lieutenant-Colonel Prendergast, it was a senseless death. In addition, other persons were also injured. Some of them were remove from their normal military duties for significant periods of time. Warrant Officer Mckay and Master Bombardier Scott continue to display after-effects from their injuries. However, the tragic consequences that resulted from the offences cannot serve to increase the sentence to a level that would take it outside of the range of what would be an adequate sentence. Doing so would violate the fundamental principle of proportionality.

[38] The court considers the following elements to be mitigating factors in the circumstances:

(a) The distinguished career of the offender: Warrant Officer (Retired) Ravensdale served his country for almost 25 years. Over his career, he served in the artillery and the infantry. He was deployed and decorated numerous times, including in operational theatres like Croatia, Bosnia, Kosovo, and Afghanistan on three occasions (2002, 2008 and 2010). His Personal Evaluation Reports from 2006 until 2011 are stellar. Warrant Officer (Retired) Ravensdale was perceived by his superiors as an extremely competent, professional and hard working senior non-commissioned officer. His leadership was commented with high praise and he was recognized as a good mentor who took care of his subordinates. The numerous letters of appreciation filed in evidence, including those by soldiers who were injured during the fatal incident at Kan Kala, such as Master Bombardier Scott and Warrant Officer, then Sergeant McKay, show that Warrant Officer (Retired) Ravensdale is a fine man with high moral values and a genuine leader. He is described

as very trustworthy who cared about all of the soldiers he had under his command, including for their safety. Warrant Officer (Retired) Ravensdale retired voluntarily from the Canadian Forces in January 2012. It is not surprising that his chain of command let him continue to perform his normal duties until the end of the rotation of Task Force 3-09 and that they continued to trust him;

(b) The age and health condition of the offender: It was established that Warrant Officer (Retired) Ravensdale suffers from Post Traumatic Stress Disorder and major depression. He is now 43 years old. His condition is directly related to operational reasons resulting from his deployments to Afghanistan in 2008 and to the events that occurred in 2010 that led to this court martial. Dr Walsh testified that his treatment is progressing well but that this type of condition requires time. She said that Warrant Officer (Retired) Ravensdale continues to be very anxious in public settings or in presence of large group of persons. He has also a lot of difficulty to trust strangers. Dr Walsh described that the offender receives a treatment that is tailored to assist the special requirements of the victims diagnosed with PTSD resulting from operational situations. In addition, Warrant Officer (Retired) Ravensdale continues to take significant quantities of medication to deal with the stress and anxiety related to his condition. Dr Walsh explained how a person like Warrant Officer (Retired) Ravensdale could be affected by a punishment that would involve incarceration. She did not know if she could continue to supervise his treatment if the offender would be incarcerated. The prosecution suggested that the condition of the offender with PTSD could not serve to mitigate the sentence based on the traditional view that it was necessary to show that a psychiatric condition contributed to the commission of the offence before evidence of such a condition could be reflected in the sentence. I disagree. As stated in Ruby, *Sentencing*, (8th edition) at section 5.275 and further:

> Increasingly, however, courts recognize that mental illness may be a mitigating actor even where it is not causally linked to the offence. Courts have taken mental condition of the accused into consideration not only where it contributed to the commission of the offence, but also where it would render imprisonment a more severe penalty for the accused that for a person who does not suffer from the same condition.
>
> ...
>
> It is clear, therefore, that sentence can be reduced on psychiatric grounds in two instances: (1) when the mental illness has contributed to or caused the commission of the offence; or (2) when the effect of imprisonment would be disproportionately severe because of the offender's mental illness. In some cases, both factors are relevant.

(c) The offender's family situation: Warrant Officer (Retired) Ravensdale is married and the father of four children. There is no doubt that the events

had a significant impact on his family, not only as a result of the diagnosis of PTSD, but also with the impact of the extended media coverage of this case in their community. He enjoys the full support of his family, even if he admittedly experiences some difficulties with his children. For them, it is an ongoing battle;

(d) The apologies and the regrets of the offender, and his conduct after the incident: During his testimony, Warrant Officer (Retired) Ravensdale sincerely apologized to and expressed his regrets to the victims, in particular to the family of Corporal Baker. Back to the events that occurred at Kan Kala in 2010, the offender acted in a professional manner during the aftermath of the incident on the range to make sure that the wounded would receive prompt assistance and that the situation would be under control. He also fully cooperated with police authorities and with the chain of command during the investigation;

(e) No previous disciplinary or criminal conviction: This is the first time that the offender is involved in the military or criminal justice system. He has no previous record; and

(f) Behaviour since his release from the Canadian Forces: Warrant Officer (Retired) Ravensdale has embarked on full-time studies at the college level and he plans to work in the field of Human Resources when he graduates, hopefully next year or shortly after. He has completed near half of his 2 years program and he contemplates to further his education at university after the completion of his college degree. He has managed to do that while battling with PTSD and its inherent difficulties.

[39] The prosecution and defence have expressed opposite views as to whether the fact that the events occurred in Afghanistan was an aggravating or a mitigating circumstance. It is recognized that as a result of the events at the Kan Kala range, this caused a significant disturbance as to the activities of 2 Platoon and its members. However, when we consider the fact that the range took place in an area considered at risk by the presence of potential insurgents and that this area was known to be a legacy minefield, it does provide a different perspective. Overall, this element is neutral but essential to the proper understanding of the totality of the circumstances in this case.

[40] The defence has recommended that the offender be sentenced to reduction in rank and to a severe reprimand. I cannot consider that the sentencing objectives of general deterrence, denunciation, retribution and rehabilitation would be properly served by the punishment of reduction in rank as the main sanction. With respect, it appears that the various levels of responsibility shared by those involved in the events that led to the courts martial of Major Lunney, Captain Watts and the offender, in light of the overall circumstances revealed during the trial, require me to conclude that the sentences imposed in the cases of *Lunney* and *Watts* are at the very low end of the spectrum, which seems to minimize or underestimate their overall level of responsibility

for the events, as it happened in the case of *Seward* and *Boland* before the Court Martial Appeal Court was seized with the matters. Although, it is appropriate, at times, to lower a sentence to give adequate weight to the sentence imposed on others, this should not be done if lowering the sentence to that level may render that sentence itself inappropriate. For those reasons, I believe that a meaningful period of imprisonment is warranted in the totality of the circumstances. Without the benefit of the previous sentences imposed on *Lunney* and *Watts*, the court would sentence the offender to imprisonment for a period of one year. However these sentences have been imposed and the court cannot ignore that fact. Therefore, I consider that a sentence of imprisonment for a period of six months with the accompanying punishments of reduction in rank to the rank of sergeant and a fine in the amount of 2,000 dollars is an appropriate, fair and just sentence, in the circumstances.

[41] The defence has submitted that, should the court impose of period of imprisonment, it should suspend its execution. The prosecution has argued that the suspension of any period of imprisonment would be contrary to the public interest and that it would bring the administration of military justice into disrepute. In *R v Paradis*, 2010 CM 3025, delivered on 2 December 2010, d'Auteuil M.J. captured the approach followed at courts martial in recent years with regard to the application of section 215 of the *National Defence Act* in relation to the discretion of a service tribunal that impose imprisonment or detention to suspend the carrying into effect of the punishment, including when the offender has since been released from the Canadian Forces prior to his trial, at paragraphs 75-82:

> [75] Section 215 of the *National Defence Act* reads as follows:
>
> > 215. Where an offender has been sentenced to imprisonment or detention, the carrying into effect of the punishment may be suspended by the service tribunal that imposed the punishment.
>
> [76] This section is in Division 8 of the Code of Service Discipline in the *National Defence Act*, which contains the provisions applicable to imprisonment and detention. The suspension of a punishment of imprisonment is a discretionary and exceptional power that may be exercised by a service tribunal, including a court martial. This power is different from the power provided by section 731 of the *Criminal Code*, which allows a civilian court of criminal jurisdiction to suspend the passing of sentence while subjecting an offender to a probation order, or the power provided by section 742.1 of the *Criminal Code* on imprisonment with conditional sentencing, which allows a civilian court of criminal jurisdiction to sentence an offender to serve a punishment of imprisonment in the community. It should be noted that since the offence of sexual abuse is an offence for which there is a minimum punishment of imprisonment, the use of those two measures is expressly excluded by the provisions of the *Criminal Code*.
>
> [77] The *National Defence Act* does not contain any particular criteria for the application of section 215. To this day, the Court Martial's interpretation of its application is quite clear and has been established by various military judges in other cases. Essentially, if the accused demonstrates, on a balance of probabilities, that his or her particular circumstances or the operational requirements of the Canadian Forces justify the necessity of suspending the sentence of imprisonment or detention, the Court will make such an order. However, before doing so, the Court must consider, once it has found that such an order is appropriate, whether or not the suspension of that sentence

would undermine the public trust in the military justice system as part of the Canadian justice system in general. If the Court finds that that it would not, the Court will make the order.

[78] Defence counsel submitted that this provision should be interpreted differently in cases where a member has already been released from the Canadian Forces when a Court Martial imposes a sentence of incarceration on that member. Defence counsel argued that in light of the view expressed by the Court Martial Appeal Court in *St-Onge* [2010 CMAC 7], this Standing Court Martial has no other choice but to suspend the sentence of imprisonment which must be imposed by the Court because of the fact that the offender was released from the Canadian Forces in July 2010.

[79] Defence counsel bases his argument on paragraph 64 of this decision, which reads as follows:

> If the public, in this context, is the Canadian Forces, it is apparent that the objective of protecting the public was significantly advanced by removing the appellant from the public, by means of his administrative release. Furthermore, if one of the purposes of imprisonment is to prepare an offender for his return to civil society, a sentence of imprisonment serves no purpose if the offender has already been returned to civil society at the time sentence is imposed. There may be cases where the offender's conduct is so egregious that the objectives of denunciation and punishment are paramount, so that the imposition and execution of a sentence of imprisonment following the offender's administrative release from the Canadian Forces would be justified but, in those cases, the military and correctional objectives of the sentence would be advanced, in spite of the offender's administrative release.

[80] I do not agree with the statement by defence counsel. The decision of the Court Martial Appeal Court in *St-Onge* imposes no obligation on the Court to exercise the power set out at section 215 of the *National Defence Act*, that is, to suspend the sentence of imprisonment in the circumstances of this case.

[81] To the contrary, the Court Martial Appeal Court in *St-Onge* merely asks military judges to give further consideration to the effects of imposing and executing a sentence of incarceration in the particular context in which a member has already been released from the Canadian Forces. In that decision, the Court underscores that insofar as the sentence of imprisonment considered is for the specific purpose of preparing an offender for a return to civilian life, such a sentence becomes pointless when a member has already been released from the Canadian Forces because it no longer serves its intended purpose. The Court Martial Appeal Court also reiterated that if a sentence is imposed to serve the objectives of denunciation and punishment because of an offender's reprehensible conduct, then that sentence can be imposed.

[82] To summarize, the Court Martial Appeal Court stated in *St-Onge* that an offender's release from the Canadian Forces is an important factor to consider when a Court Martial is deciding whether or not to impose a sentence of imprisonment on the offender. In so doing, it noted that this measure is a last resort that must be considered in accordance with the principles and objectives applicable to sentencing. To do otherwise could result in undermining public confidence in the system of military justice, as a component of the Canadian justice system in general.

[42] The testimony of Dr Walsh establishes, on a balance of probabilities, that incarceration will have a negative impact on Warrant Officer (Retired) Ravensdale that would go beyond the normal effect expected on an ordinary offender waiting to be

incarcerated. His condition requires a special treatment that has been ongoing for an extended period of time with her. She said that the type of PTSD suffered by Warrant Officer (Retired) Ravensdale, as a result of operational stress injuries, requires a more specialized treatment. As clinical therapist, she has treated the offender for the last two years on a 90 minutes per week basis, over 75 sessions until now. Dr Walsh testified to the progress made so far by Warrant Officer (Retired) Ravensdale and she asserts that the treatment is going well, but that the progress fluctuates depending on the stressors that would affect him. She is concerned that Warrant Officer (Retired) Ravensdale may not be able to pursue his treatment with her and that it would impact negatively on his recovery. It cannot be ignored that the offender has developed, over more that one year, a privileged relationship with Dr Walsh and that the substitution of his therapist may be counterproductive in the context of serving a period of imprisonment for six months. Not only, a new therapist would require time to build the required relationship of trust with Warrant Officer (Retired) Ravensdale, but he or she would need to deal with the inevitable increase in the level of stress of his new patient as a result of the incarceration. I am not satisfied that Warrant Officer (Retired) Ravensdale would not have access to a specialized treatment for environmental PTSD if he was sent to serve his sentence in a correctional facility. However, I consider important that he can continue his treatment without interruption and with the same therapist. Finally, it is also relevant, but to a lesser degree, to realize that the rehabilitation of the offender would be disturbed with regard to his further studies.

[43] Whether or not the suspension of that sentence would undermine the public trust in the military justice system as part of the Canadian justice system in general requires a close analysis of the overall circumstances of the case and the degree of responsibility of the persons involved in the sequence of events that led to the tragic events at Kan Kala. I have already commented extensively on the role and the responsibilities of Major Lunney and Captain Watts in these events, as well as the absence of training on the C19s during the pre-deployment phase of Task Force 3-09. I also refer to my comments in relation to the principle of proportionality between the three individuals, including the sentences imposed on the officer commanding Stab A and 2 Platoon. Based on those findings, I am unable to conclude that a reasonable observer aware of all the circumstances surrounding these events would conclude that the suspension of the carrying into effect of the punishment of imprisonment is likely to undermine the public trust in the military justice system in the specific case of Warrant Officer (Retired) Ravensdale.

[44] As requested by the prosecution, I have considered whether a weapons prohibition order under section 147.1 of the *National Defence Act* should be made in this case. While the offences involve an explosive substance, I am not persuaded that the interests of the safety of the offender or anyone else require a weapons prohibition order. The prosecution argued that the guilty findings made in relation to the contravention of sections 80 and 269 of the *Criminal Code* would trigger the application of section 109 of the *Code* and that such order would be mandatory. Orders made under section 147.1 of the *National Defence Act* are discretionary. Orders made under section. 109 of the *Code* are mandatory where a person is convicted of:

> (a) an indictable offence in the commission of which violence against a person was used, threatened or attempted and for which the person may be sentenced to imprisonment for ten years or more,
>
> (b) an offence under subsection 85(1) (using firearm in commission of offence), subsection 85(2) (using imitation firearm in commission of offence), 95(1) (possession of prohibited or restricted firearm with ammunition), 99(1) (weapons trafficking), 100(1) (possession for purpose of weapons trafficking), 102(1) (making automatic firearm), 103(1) (importing or exporting knowing it is unauthorized) or section 264 (criminal harassment),
>
> (c) an offence relating to the contravention of subsection 5(1) or (2), 6(1) or (2) or 7(1) of the *Controlled Drugs and Substances Act*, or
>
> (d) an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance and, at the time of the offence, the person was prohibited by any order made under this Act or any other Act of Parliament from possessing any such thing.

[45] The offences for which the offender was found guilty did not involve the use, threat or attempt of violence; they are not expressly listed in section 109; and, although the offences involved the use of an explosive substance, there is no evidence before the court that Warrant Officer (Retired) Ravensdale was prohibited by any order made under the *Criminal Code* or any other Act of Parliament from possessing any such thing.

[46] Finally, since the offender was found guilty of a primary designated offence under paragraph 196.11(*a*) of the *National Defence Act*, I will make an order under section 196.14 for the taking of samples of bodily substances for the purpose of forensic DNA analysis.

FOR THESE REASONS, THE COURT:

[47] **SENTENCES** the offender, Warrant Officer (Retired) Ravensdale, to imprisonment for a period of six months with the accompanying punishments of reduction in rank to the rank of Sergeant and a fine in the amount of 2,000 dollars.

[48] **SUSPENDS** the carrying into effect of the punishment of imprisonment pursuant to section 215 of the *National Defence Act.*

AND

[49] **MAKES** the order under section 196.14 of the *National Defence Act* for the taking of samples of bodily substances for the purpose of forensic DNA analysis.

Counsel:

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Counsel for Her Majesty the Queen

Major L.P. Boutin and Lieutenant-Commander P. Desbiens, Directorate of Defence Counsel Services
Counsel for Warrant Officer (Retired) P.G. Ravensdale