COURT MARTIAL

Citation: *R v McConnell*, 2013 CM 4022

Date: 20130926
Docket: 201316

Standing Court Martial

Her Majesty's Canadian Ship PREVOST
London, Ontario, Canada

Between:

Her Majesty the Queen

- and -

ex-Ordinary Seaman R.K. McConnell, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Ex-Ordinary Seaman McConnell, having accepted and recorded your plea of guilty to charges number 2 and 3, the court now finds you guilty of these charges laid under section 129 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 these offences. At the time of the offences, you were a Primary Reserve sailor on a Class B engagement, residing in Atlantic ("A") Block, Canadian Forces Base Halifax on a floor restricted to male residents. You shared a room with Ordinary Seaman Grondines. In the early morning hours of 12 June 2011, you arrived at your room and joined Ordinary Seaman Grondines and Miss K.V.P., a female companion of Ordinary Seaman Grondines. All had voluntarily consumed various quanti-

ties of alcohol over the previous few hours. Over the next hour you and Ordinary Seaman Grondines engaged in consensual sexual activity with Miss K.V.P.

[3] At approximately 0745 hours on 12 June 2011, following the sexual activity, Miss K.V.P. became unconscious and could not be awoken. You and Ordinary Seaman Grondines secretly moved her while she was still unconscious to the adjacent room of Ordinary Seaman Podesta while he was momentarily out of his room. Upon returning to his room, he discovered Miss K.V.P. partially clothed and unconscious in his bed. You and Ordinary Seaman Grondines re-entered Ordinary Seaman Podesta's room and started touching and prodding Miss K.V.P., at which point Ordinary Seaman Podesta directed that you stop and depart the room. Unable to revive her, Ordinary Seaman Podesta and other sailors informed military authorities and medical attention was sought. She was taken by ambulance to hospital where she later regained consciousness.

[4] Having reviewed the main facts of this case, I will now determine the sentence.

[5] 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.

[6] 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 acknowledgment of the harm done to victims and to the community.

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

[8] The sentencing provisions of the *Criminal Code*, ss. 718 to 718.2, provide for an individualized sentencing process in which the court must take into account not only

the circumstances of the offence, but also the specific circumstances of the offender. 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.

[9] 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 the military society. Discipline is one of the fundamental prerequisites to operational efficiency in any armed force.

[10] The prosecution and your defence counsel have jointly proposed a sentence of a reprimand and a fine in the amount of $1,000 to be paid in monthly instalments of $100. 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.

[11] 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 129 of the *National Defence Act*, prejudice to good order and discipline, is an objectively serious offence since one can be sentenced to dismissal with disgrace from Her Majesty's service or to lesser punishment in the scale of punishments;

(b) subjectively, these offences are not one of the most serious disciplinary offences when one stops the analysis of the particulars of the charges. I do not want to appear to be trivializing these offences. Having a female visitor in his room outside of visiting hours and engaging in sexual activity contrary to the DND Quarters Regulations is a breach of discipline but I would not describe it as one of the most egregious breaches seen by courts martial. But the analysis cannot stop there. The circumstances surrounding the charges must also be considered; and

(c) you demonstrated a complete lack of respect for the dignity of Miss K.V.P. when you brought her to Ordinary Seaman Podesta's room while she was unconscious and partially dressed. These actions were described by your counsel as a skylark and a joke in very poor taste by the prosecutor. I fail to see anything funny about how you treated Miss K.V.P. While it appears you were under the influence of alcohol during the night, I find your actions fell well short of the type of respectful and ethical conduct we expect of any member of the Canadian Forces. I suggest you take a long look in the mirror and reflect upon your actions.

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

(a) you do not have a conduct sheet, therefore, you are a first time offender;

(b) you informed the Canadian Forces National Investigation Service (CFNIS) investigator of your actions when you were interviewed on 6 February 2012. You have pled guilty. Therefore, a plea of guilty and cooperation with the police will usually be considered as mitigating factors. 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 charges laid against the accused but is seen as a means for the courts to impose a more lenient sentence because the plea of guilty usually means that witnesses do not have to testify and that it greatly reduces the costs associated with the judicial proceeding. It is also usually interpreted to mean that the accused wants to take responsibility for his or her unlawful actions and the harm done as a consequence of these actions;

(c) you were 23 years old and had served in the Royal Canadian Navy for only 13 months at the time of the offences. As such, I will consider you a youthful offender and your inexperience as a member of the Navy will be considered a mitigating factor;

(d) Miss Bronfield has known you as a friend for the last year and she testified that you are a polite, respectful person whom she trusts. She feels safe with you and she has never seen any behaviour similar to the events at the heart of this case;

(e) you requested your release from the Canadian Forces and it was granted on 21 June 2012 under item 4C (on request-other reasons); thus, you were honourably released. You are presently employed as a carpenter's apprentice and have embarked on a four year apprenticeship. You work 40 hours a week and are paid $13 per hour. You share an apartment with your brother and another person and you pay your share of the normal living expenses; and

(f) it would appear that your behaviour on 12 June 2011 is not representative of who you really are. I will let those who truly know you be the judge of that. Hopefully, that is the case and you have learned from that dishonourable episode of your life.

[13] On 30 June 2011, Ordinary Seaman Podesta told the CFNIS investigators that he saw you and Ordinary Seaman Grondines with Miss K.V.P. after he discovered her in his bed. You were interviewed by the CFNIS on 6 February 2012. you were charged by a CFNIS investigator on 20 June 2012. On 12 October 2012, the file was referred to the Commander, Royal Canadian Navy and on 7 December 2012, the Com-

mander Royal Canadian Navy referred the file to the Director of Military Prosecutions (DMP). On 13 December 2012, the file was assigned to a prosecutor for post-charge screening. On 31 January 2013, he preferred three charges against Ordinary Seaman McConnell.
[14] On 12 March the prosecutor submitted a proposed resolution to Lieutenant-Commander Walden, then counsel for Ordinary Seaman McConnell. On 29 April 2013 the prosecution was informed that Mr Bright, Q.C., would be appointed counsel for Ordinary Seaman McConnell and on 4 June 2013 Lieutenant-Commander Reeves was appointed as prosecutor in this matter.

[15] It took seven months for the investigator to interview you after he or she had learned of your involvement. You served aboard HMCS ATHABASKAN from 28 August to 10 October 2011 on Operation CARIBE. While I have not been provided any evidence to explain these delays, I fail to see why it took so long to interview you. I also fail to understand why it would take another four months to lay charges after you had confessed. Your unit then took approximately four months to forward these charges to the referral authority who in turn took approximately two months to refer the charges to DMP. Defence counsel did indicate that a small portion of the delay can be attributable to actions of the defence.

[16] I do not have any information as to why the unit and the referral authority did not accomplish their role in a much more expeditious manner. I feel I must repeat what I have already stated concerning delays in the handling of disciplinary files.

[17] 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 sentence.

[18] I am not finding that there has been any misconduct on the part of the prosecutor or any other person involved on the bringing of this case to trial. But I have not been provided with much evidence to explain the delay. The CFNIS, every authority in the disciplinary process and the prosecutors have the duty to deal with charges as expeditiously as the circumstances permit. (see s. 162 of the *National Defence Act*) 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 an important mitigating factor.

[19] I have concluded that denunciation and general deterrence are the main sentencing principles that need to be applied in the present case. Having reviewed the totality of the evidence, the jurisprudence and the representations made by the prosecutor and your defence counsel, I have thus come to the conclusion that the proposed sentence is the minimum necessary sentence for the purposes of discipline and that this sentence would not bring the administration of justice into disrepute and that the proposed sen-

tence 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:

[20] **SENTENCES**, ex-Ordinary Seaman McConnell, to a reprimand and a fine in the amount of $1,000. The fine shall be paid in monthly instalments of $100 starting on the 15th day of October, 2013.

Counsel:

Lieutenant-Commander D.T. Reeves, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

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