COURT MARTIAL

Citation: *R v Sutherland*, 2013 CM 4023

Date: 20130930
Docket: 201335

Standing Court Martial

St-Jean Garrison
Saint-Jean-sur-Richelieu, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Sergeant R.L. Sutherland, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Sergeant Sutherland, having accepted and recorded your plea of guilty to charges number 1, 2, 3 and 4 the court now finds you guilty of these charges laid under sections 83 and 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 employed as a Basic Military Qualification instructor, at the Canadian Forces Leadership and Recruit School (CFLRS) in Saint-Jean-sur-Richelieu. You were an instructor of platoon R25, B Company, Recruits Division. Ordinary Seaman Doyle, a former candidate of platoon R25, had been transferred to Warriors Preparation Company (WPC), Specialized Division.

[3] On Friday, November 9, 2012, you approached Ordinary Seaman Doyle in the gym. You were aware that she was now a candidate within WPC. Over the course of the discussion, you asked her about her plans for the weekend and asked for her phone number which she gave to you. Later that same day, you exchanged text messages of a personal nature with Ordinary Seaman Doyle until she became uncomfortable and stopped responding. The last message she received from you was at 0752 hours, on November 10, 2012.

[4] On 10 November 2012, Private Nobbs was approached by Ordinary Seaman Doyle about the inappropriate text messages sent by you. After reading all the text messages exchanged between you and Ordinary Seaman Doyle, he asked for her permission to speak with Master Seaman Jenkins, as he knew he was on duty. He then went with Ordinary Seaman Doyle's phone to speak to Master Seaman Jenkins and showed him the text messages. Master Seaman Jenkins became concerned about the content of the messages. When he later spoke to Ordinary Seaman Doyle, Master Seaman Jenkins explained to her that the conversation was inappropriate and the she should report the matter officially after the long weekend.

[5] Master Warrant Officer Fuller, the Company Sergeant-Major of B Company, was made aware on 13 November 2012, that there might be an issue with one of the staff from B Company in relation to a candidate from Warriors Preparation Company (WPC). On 14 November 2012, he was informed that the issue concerned Sergeant Sutherland and he received the written statements of Ordinary Seaman Doyle and Private Nobbs, along with a transcript of the text messages exchanged. As a consequence, you were removed from the field and ordered not to have any contact with any candidates prior to the conclusion of the investigation. You were however to remain with the platoon and continue to help with the running of the course.

[6] On 15 November 2012, Master Warrant Officer Fuller interviewed you under caution about the allegations made by Ordinary Seaman Doyle. You cooperated with the investigation and made admissions over the course of the interview. At the end of this interview, you were reminded by Master Warrant Officer Fuller that you were still suspended form instructor's duty and that you were not to have any contact with Ordinary Seaman Doyle or any other candidate until the investigation was complete.

[7] On 26 November 2012, Master Warrant Officer Fuller and Captain Bain, the OC of B Company, sat with you and you were informed that Master Warrant Officer Fuller had finished the investigation and that he believed there was sufficient evidence to warrant the laying of a charge. They both told you that you were to have no contact with any candidate from platoon R25. You were further told that you were to remain with the platoon and continue to help with the running of the course, but that you were not to have any direct contact with candidates on this course. You were also told that you would have no contact except for strictly work related contact with any candidate at CFLRS, including WPC, PAR, CAC, WFT, WFT-W, Leadership Division or Recruit Division. You were told that you would have no contact with the candidate who brought up the allegations.

[8] On 29 November 2012, you were in a classroom talking with recruits from platoon R25, with both doors closed. Master Warrant Officer Fuller went to the classroom and ordered you to leave the classroom, to which you complied. He also told you that if you did not smarten up, that you would find yourself in trouble. At 0433 hours on 30 November 2012, you were again speaking with candidates from platoon R25 and were handling their kit bags in a classroom.

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

[10] 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.

[11] 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.

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

[13] 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.

[14] 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

[15] 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 $250. 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.

[16] 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) the offence of disobeying a lawful command of a superior officer is objectively one of the most serious offences under the Code of Service Discipline since the maximum sentence is imprisonment for life. Section 129 of the *National Defence Act*, prejudice to good order and discipline, is also 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, I also find these offences to be serious. You knew the orders that applied to the conduct of instructors at the Recruit School and you chose to set them aside. You were ordered on at least two occasions by your immediate superiors to cease having contacts with candidates from your platoon but decided to do otherwise. No explanation was provided for your actions;

(c) you sent inappropriate personal texts to Ordinary Seaman Doyle that made her uncomfortable. She terminated the communication with you. She went to see a fellow candidate to seek his counsel. Your actions are not those of a responsible instructor and they reflect badly on the rest of the staff. As stated in the Recorded Warning issued to you on 11 April 2013, and I quote portions of that Recorded Warning:

> "He demonstrated a lack of integrity and professionalism in his actions. Sergeant Sutherland acted in a manner which brought discredit towards, not only the instructing staff at CFLRS, but also all personnel who are in a position of authority. He displayed a lack of duty and integrity through his actions. Sergeant Sutherland lost all credibility through his actions regarding Private (Recruit) Doyle. Sergeant Sutherland lost the trust of the chain of command and candidates by disregarding unit SOPs."

(d) you do have a conduct sheet but the two offences occurred in 2003 when you were a corporal. You breached a CANFORGEN concerning the appropriate use of Canadian Forces computers. You received a substantial fine in the amount of $1,500. While I will not consider you a first time offender as suggested by your counsel, I will not put as much weight on the fact that you have a conduct sheet as I would normally because of the passage of time; and

(e) you were 43 at the time of the offence and had been in the Regular Force for 22 years. You were promoted to the rank of sergeant in 2011. You were old enough and had enough experience to know better.

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

(a) you cooperated fully with the disciplinary investigation. You have pled guilty. Therefore, a plea of guilty will usually be considered as a mitigating factor. This approach is generally not seen as a contradiction of the right to silence and of the right to have the prosecution prove beyond a reasonable doubt the 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 and time associated with the judicial proceedings. 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;

(b) Master Warrant Officer Fuller testified you had been a very good instructor until these offences. I have reviewed Exhibit 11 which contains six Personnel Evaluation Reports (PERs). Your performance for the period 2012 – 2013 was rated as exceeding standard and your potential for promotion was rated as above average. The OC of Recruit Division had recommended you be loaded on the next QL6B course and he stated you were ready for promotion to the rank of warrant officer. The six PERs were excellent but these convictions will surely have an adverse impact on your next PER;

(c) a Recording Warning was issued to you on 11 April 2013 and the monitoring period will end on 11 October 2013. Your actions that led to these charges are the reasons for this administrative remedial measure concerning your deficient conduct. As such, this remedial measure will be considered a mitigating factor.

[18] I do not agree with your counsel that the decisions to relieve you as an instructor and the posting to Yellowknife should be considered as mitigating factors. Your chain of command determined that your actions were serious enough to warrant your removal as an instructor. The statement of circumstances indicates you were asked if you would

like to be posted out of CFLRS to Yellowknife. You expressed a desire to be posted and were then posted to Yellowknife. I have not been provided any evidence demonstrating that either of these decisions had a negative effect on you.

[19] The law in Canada is quite clear on the issue of joint submissions. A sentencing judge has very little leeway in the case of a guilty plea. This is because the court does not have all of the information that led to the plea and to the joint submission. A court must respect the agreement of both parties unless it is clearly not in the public interest or that the proposed sentence would bring the administration of justice into disrepute.

[20] 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 would not bring the administration of justice into disrepute and that the proposed sentence is in the public interest. The proposed sentence is also the minimum necessary sentence for the purposes of discipline in this specific case. Therefore, I agree with the joint submission of the prosecutor and of your defence counsel.

FOR THESE REASONS, THE COURT:

[21] **SENTENCES**, you to a reprimand and a fine in the amount of $1,000. The fine shall be paid in monthly instalments of $250 starting on the 15th day of October, 2013.

Counsel:

Major P. Doucet and Captain R. de Balinhard, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Lieutenant-Commander B.G. Walden, Directorate of Defence Counsel Services
Counsel for Sergeant R.L. Sutherland