COURT MARTIAL

Citation: *R v Morton*, 2013 CM 4003

Date: 20130130
Docket: 201267

Standing Court Martial

Canadian Forces Base Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Petty Officer 1st Class D.W. Morton, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Petty Officer 1st Class Morton, having accepted and recorded your pleas of guilty to charge number one and four, the court now finds you guilty of these charges and directs that the proceedings on the second and third charges be stayed. 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, the agreed statement of facts and your testimony provide this court with the circumstances surrounding the commission of these offences. At the time of the offences you were posted to the Naval Electronic Warfare Centre in Ottawa, Ontario as the Fleet Support Supervisor.

[3] In Dartmouth, Nova Scotia, between 1 and 19 December 2011, you approached your friend, Petty Officer 2nd Class Collins. During your conversation you asked Petty Officer 2nd Class Collins to complete the CF EXPRESS Test on your behalf and he

agreed to do so. On 19 December 2011, Petty Officer 2nd Class Collins, while pretending to be you, successfully completed the CF EXPRESS Test. He signed the DND 279 CF EXPRESS Program form using your identity. Following the test, you were given the member's copy of the DND 279 CF EXPRESS Program form that had been forged by Petty Officer 2nd Class Collins.

[4] On 10 January 2012, upon returning to your unit in Ottawa, you advised your supervisor, Chief Petty Officer 2nd Class Forrester, that you had successfully completed the CF EXPRESS Test. You showed Chief Petty Officer 2nd Class Forrester the "member's copy" of the DND 279 CF EXPRESS Program form you had received from Petty Officer 2nd Class Collins, intending Chief Petty Officer 2nd Class Forrester to accept it as a true document. The results of the 19 December 2011 CF EXPRESS Test were recorded in your Member's Personnel Record Résumé and your annual Performance Evaluation Report (PER) for 2011.

[5] The DND 279 CF EXPRESS Program form is used as part of the Canadian Forces Minimum Physical Fitness Standard, and is a fitness assessment and record management system employed by the Canadian Forces to encourage individual physical fitness, and to regularly assess and maintain an institutional record of the level of individual physical fitness of CF members. This form, which records the results of EXPRESS testing, is used by the chain of command in making decisions related to Canadian Forces members' careers, including the evaluations provided annually through PERs. The Canadian Forces medical and promotion policy requires that members maintain no less than a "Pass" on their CF EXPRESS Test evaluation in order to be eligible for promotion.

[6] As indicated by the Court Martial Appeal Court, sentencing is a fundamentally subjective and individualized process where the trial judge has the advantage of having seen and heard all of the witnesses and it is one of the most difficult tasks confronting a trial judge.

[7] 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.

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

[9] 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.

[10] A judge must weigh the objectives of sentencing that reflect the specific circumstances of the case. It is up to the sentencing judge to decide which objective or objectives deserve the greatest weight. The importance given to mitigating or aggravating factors will move the sentence along the scale of appropriate sentences for similar offences.

[11] A 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 forces.

[12] The prosecution suggests that the following principles of sentencing apply in this case: denunciation, general and specific deterrence and rehabilitation. The prosecution has provided this court with three cases in support of its submission that the minimum sentence in this matter is reduction in rank to petty officer 2nd class, a reprimand and a fine in the amount of $1,000 to $3,000. Defence counsel asserts that a reprimand and a fine in the amount of $1,500 would represent a just sentence in this case.

[13] 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 128 of the *National Defence Act*, conspiracy, is an objectively serious offence since one can be sentenced to imprisonment for a term not exceeding seven years or to lesser punishment in the scale of punishments. An act of a fraudulent nature charged under sub-section 117(*f*) of the *National Defence Act* is not as serious objectively since its maximum sentence is imprisonment for less than two years;

(b) these offences involved some premeditation on your part. You met with Petty Officer 2nd Class Collins and asked him to do the CF EXPRESS test for you. You then called to make the appointment for the test. You provided him your service number, date of birth, home unit, unit identification code and other personal details he would need to fill out the form;

(c) these offences were not done on the spur of the moment but were quite intentional and planned. Petty Officer 2nd Class Collins completed the test on 19 December 2011 and he gave you the member's copy of that form on that day. You showed that copy to Chief Petty Officer 2nd Class Forrester on 10 January 2012 telling him you had passed your CF EXPRESS Test;

(d) the prosecutor argued you had abused your position of trust *vis-à-vis* the Canadian Forces and your supervisors and your position of authority *vis-à-vis* Petty Officer 2nd Class Collins. I do not agree with the prosecutor. You did lie to your supervisor and you did intend to defraud the Canadian Forces but you did not specifically abuse a position of trust at the time of the offence. While Petty Officer 2nd Class Collins is subordinate in rank to you, you did have the conversation as friends who have known each other for over 20 years and I have not been provided with any evidence that would demonstrate that you abused your authority when you conspired with Petty Officer 2nd Class Collins. As such, I will not consider the principle found at paragraph 718.2(a)(iii) of the Criminal Code as an aggravating factor;

(e) you told Petty Officer 2nd Class Collins that you were ranked number two on the merit list and could be promoted early in the new year provided you passed your CF EXPRESS test beforehand. You explained to Petty Officer 2nd Class Collins that you would be unable to complete the EXPRESS test because of a medical condition and asked him to do the CF EXPRESS test;

(f) what you did do is place the well-being of a friend at risk by asking him to do the CF EXPRESS test for you. You surely knew the possible consequences he would face should your plan be discovered. You have been a member of the Canadian Forces long enough to know he could be charged and the resulting consequences on his life and his career. While he is ultimately responsible for his decision to help you and face these possible consequences, you showed disregard for his well-being because you wanted to be promoted to the rank of chief petty officer 2nd class. Your motive for these offences was personal gain. That is not a leadership quality; and

(g) while you do have a conduct sheet, it is quite dated and contains unrelated offences. As such, I will not consider it as an aggravating factor;

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

(a) you have pled guilty. Therefore, a plea of guilty will usually be considered as a mitigating factor. This approach is generally not seen as a contradiction of the right to silence and of the right to have the prosecution prove beyond a reasonable doubt the 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;

(b) the credit given to a guilty plea varies with the circumstances of each case. Remorse was much discussed during the sentencing hearing. An absence of remorse is not an aggravating factor. Remorse reflects the offender's character and attitude towards his crimes and his prospects of rehabilitation;

(c) while I agree with defence counsel that this guilty plea is a mitigating factor, I do not agree that Petty Officer 1st Class Morton has always accepted responsibility for his actions. He testified and he stated that he called a military lawyer in March 2012. As a result of this conversation he did not provide any information to his superiors concerning these offences. It was his right not to admit his illegal acts. He cannot be punished for exercising these legal rights. Therefore, his sentence cannot be increased because he did not turn himself in and he did not cooperate with the authorities. But his decision to keep silent does not support defence counsel's claims that he has always accepted responsibility for his illegal actions;

(d) during his examination-in-chief, when asked why he did what he did, Petty Officer 1st Class Morton did not state that he had committed these offences to ensure he would be promoted but instead stated he was scared he would be released because he would not meet the conditions of universality of service. During his cross-examination he was not forthcoming with that reason although it is clearly stated in the agreed statement of facts found at Exhibit 6;

(e) petty Officer 1st Class Morton testified about having to complete the CF EXPRESS test in late 2011, but he also testified that he had been told he had to complete the test by March 31st, 2012. He testified in cross-examination that he did not know one could be medically excused from

performing the CF EXPRESS test during the PER reporting period. Yet, he could research the official PER documentation when it came time for him to redress his PER. I do not find that the evidence demonstrates Petty Officer 1st Class Morton has always taken full responsibility for his actions. Having said that, his guilty plea is considered a mitigating factor;

(f) there was much discussion concerning the two redresses of grievance concerning Petty Officer 1st Class Morton's PER. It was his right to seek a redress. Both redresses were granted. This evidence is not considered in the determination of a fit sentence in this case;

(g) I have reviewed the letters of recommendation at Exhibit 9 and the PERs at Exhibit 10. These documents and the testimony of all the defence witnesses clearly demonstrate that Petty Officer 1st Class Morton has always been an excellent Naval Electronic Sensor Operator. He has also shown excellent leadership qualities when serving onboard ships or on shore postings. I will accept his evidence that his medical condition; namely, his sore back and the resulting lack of sleep and stress did affect his judgment at that period of time. Wile I accept it to explain your conduct, it does not excuse it; and

(h) it does appear from the evidence that your actions are quite out of character for you. While the premeditation, planning and the period of time of these offences are counter-balancing aggravating factors, I will consider your otherwise previous excellent service and the conclusion that these offences are out of character as mitigating factors.

[15] I have reviewed the case law presented to me by the prosecutor and defence counsel. I find these cases are less serious than the present case. While they all involve dishonest activities related to the CF EXPRESS test, none of the offenders were convicted of conspiracy or the cases do not represent facts similar to the present case. Sergeant Biron was convicted in 2010 of two charges laid under s. 125 of the *National Defence Act* of having made a false entry in a document and was sentenced to a reprimand and a fine in the amount of $1,000 following a joint submission to the court. Petty Officer 2nd Class Collins was convicted in 2012 of having made a false entry in a document under s. 125 of the *National Defence Act* and was sentenced to a reprimand and a fine in the amount of $1,200 following a joint submission to the court. Colonel Lewis was convicted in 2012 of a charge under s. 125 of the *National Defence Act* of having altered a document and was sentenced to a fine in the amount of $5,000. A reduction in rank was requested by the prosecution in that case.

[16] Corporal Chevrier was convicted in 2004 of one charge that appears to have been laid under s. 125 of the *National Defence Act* of having submitted a falsified document and was sentenced to a fine in the amount of $650. Defence counsel also cited the case of Lieutenant-Colonel Miller who would have been convicted of one charge

laid under s. 125 of the *National Defence Act* and of two charges laid under s. 129 of the *National Defence Act* for having lied about her CF EXPRESS test and having submitted a false form. She was sentenced to a severe reprimand and a fine in the amount of $3,000. It would appear that the prosecution did not seek a reduction in rank in that case.

[17] *In* R v Nasogaluak, 2010 SCC 6, the Supreme Court of Canada describes the concept of proportionality in sentencing at paragraph 42, as such:

> 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. Understood in this latter sense, sentencing is a form of judicial and social censure. 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.

[18] In *R v Reid* and *R v Sinclair*, 2010 CMAC 4, the Court Martial Appeal Court states at paragraph 39:

> ... A reduction in rank is an important tool in the sentencing kit of the military judge. It signifies more effectively than any fine or reprimand that can be imposed the military's loss of trust in the offending member....

[19] Although Petty Officer 1st Class Morton did not use his rank to commit these offences and he did not abuse his rank when he asked Petty Officer 2nd Class Collins to do the test for him, he did commit these offences for personal gain, a promotion to the rank of chief petty officer 2nd class. Petty Officer 1st Class Morton did not show the leadership qualities we expect of a petty officer 1st class when he committed these offences. He put personal gain ahead of his friend and of his responsibilities as a senior NCO.

[20] Petty Officer 1st Class Morton was initially charged in May 2012 and a charge sheet was completed on 4 October 2012. He was put on counselling and probation (C&P), an administrative remedial measure, on 13 November 2012. His court martial was convened on 23 November 2012. His unit in Ottawa did not change his employment or his responsibilities. There was no testimony presented to the court indicating his work was supervised more closely following the discovery of the offences.

[21] He was posted to Trinity as an above water warfare analyst in December 2012 notwithstanding the fact that DAOD 5019-4 clearly indicates a person under C&P is not to be posted unless the posting is for an operational deployment or DGMC determines otherwise. The court has not been provided with any evidence that DGMC was involved with this posting.

[22] Trinity is by its very nature a very sensitive posting because of the type of work this unit performs for the Canadian Forces and the Canadian government. Anyone who has watched the news in the last few months would know the nature of that unit. Petty Officer 1st Class Morton has a Top Secret security classification.

[23] It would thus appear that Petty Officer 1st Class Morton was posted to a key intelligence gathering unit while he was on C&P and awaiting his trial. It does appear that competent authorities within his trade and his chain of command thought he was trustworthy enough to occupy the position of an above water warfare analyst in the rank of petty officer 1st class in a very sensitive and key intelligence gathering unit.

[24] In determining the appropriate sentence the court has considered the circumstances surrounding the commission of these offences, the mitigating and aggravating circumstances presented by your counsel and by the prosecutor, the jurisprudence presented by counsel and the representations by the prosecution and by your defence counsel as well as the applicable principles of sentencing.

[25] The principles of denunciation, deterrence, general and specific, as well as rehabilitation have been considered by the court. While I have not been convinced the punishment of a reduction in rank is an appropriate punishment in the specific circumstances of this case, the court must impose a sentence that will provide a clear message to you and to others that this type of conduct is unacceptable and a sentence that will assist you in taking responsibility for your offences.

FOR THESE REASONS, THE COURT:

SENTENCES Petty Officer 1st Class Morton to a severe reprimand and a fine in the amount of $3,000. The fine shall be paid in monthly instalments of $500 starting on 15 February 2013. The outstanding amount is to be paid completely before your last day should you be released for any reasons before the fine is completely paid.

Counsel:

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

Mr D. Bright, Boyne Clark LLP
99 Wise Road
Dartmouth, NS B3A 4S5
Counsel for Petty Officer 1st Class D.W. Morton