Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20230803

Docket: CMAC-626

Citation: 2023 CMAC 9

CORAM: **CHIEF JUSTICE BELL**
HOEGG J.A.
CHARBONNEAU J.A.

BETWEEN:

CORPORAL MOHAMMAD EL ZEIN

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Ottawa, Ontario, on February 17, 2023.

Judgment delivered at Ottawa, Ontario, on August 3, 2023.

REASONS FOR JUDGMENT BY: HOEGG J.A.
CHARBONNEAU J.A.

CONCURRED IN BY: BELL C.J.

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REASONS FOR JUDGMENT

HOEGG J.A. and CHARBONNEAU J.A.

I. Introduction

[1] On December 1, 2021, a Military Judge convicted the Appellant, Corporal El-Zein, of sexual assault, an offence set out in s. 130 of the *National Defence Act*, R.S.C. 1985, c. N-5

[*National Defence Act*], as contemplated by s. 271 of the *Criminal Code* (R.S.C. 1985, c. C-46) [*Criminal Code*]. He is appealing his conviction and the sentence imposed on him by the Military Judge.

II. Background

[2] For the purposes of this appeal, it is not necessary to provide a complete summary of the evidence presented at trial. It is sufficient to summarize the salient facts relevant to the determination of the issues.

[3] The testimony of D.F. (the victim) and the testimony of the Appellant were consistent in several respects. Their versions of the circumstances of their meeting, their interactions before the day of the incident, and even certain aspects of what happened on the day of the incident are very similar.

[4] D.F. and the Appellant met while both were deployed on an operation to assist people following major flooding in the Montreal area in the spring of 2019.

[5] The Appellant and D.F. were on good terms and were getting to know each other. On the day of the incident, they had gone for a run together, at the Appellant's suggestion. It was during this activity that the incident that led to the charges against the Appellant occurred.

[6] During the run, he discussed with her the possibility of their having sexual relations. D.F. replied that while she was open to the possibility, she preferred to wait until she got to know

someone better before being intimate. D.F. stated that she felt uncomfortable during that conversation and tried to change the subject, but the Appellant continued to ask her questions of a personal nature. The Appellant acknowledged that D.F. had told him that she preferred to get to know someone better before being intimate, but said that he had not noticed any discomfort on her part during their conversation.

[7] They both agree that, after running for some time, they stopped to take a break and sat down on a rock. The Appellant then kissed D.F. He then got up, took her by the hand and walked, holding her hand, to the inside of a circle of trees not far from the rock where they had been sitting. Once out of the view of others, the Appellant again kissed D.F. He took her hand and placed it on his penis. He touched her vulva under her underwear.

[8] The two testimonies diverge considerably when it comes to D.F.'s behaviour and reactions in response to the Appellant's advances and actions.

[9] D.F. stated that she did not want to be physically intimate with the Appellant at that time. She was uncomfortable, frozen and did not respond to his kisses and caresses. She even feared for her safety at one point. She did not say or do anything to indicate that she consented to sexual touching with the Appellant.

[10] The Appellant stated, on the contrary, that D.F. seemed a little embarrassed or reluctant at first, but eventually responded to his kisses and caresses, fully participated in their exchange and

showed through her actions and moans that she was experiencing pleasure and fully consented to what was happening.

[11] The Appellant argued at trial that the Crown had failed to prove the absence of consent by D.F. In the alternative, he requested that the Military Judge consider the defence of honest but mistaken belief in consent. The Military Judge found that this defence was unavailable because the Appellant had taken no reasonable steps to ascertain D.F.'s consent pursuant to the *Criminal Code*, s. 265(4). The Military Judge's decision not to consider this alternative defence is not being challenged in this appeal.

[12] On the issue of consent, the Military Judge found that the Appellant's testimony was not credible with regard to the details of his interaction with D.F. He accepted D.F.'s version of the facts and on that basis concluded that she had not consented to the sexual activity and that the Appellant knew this. He therefore found the Appellant guilty.

[13] At the sentencing hearing, the parties presented a joint submission of 30 days' detention, a demotion to the rank of Private, and a $5,000 fine.

[14] The Military Judge imposed a sentence of 30 days' imprisonment, a demotion, and a fine of $5,000. For the purposes of the military justice system, imprisonment is a more severe punishment than detention (*National Defence Act*, s. 139).

[15] The Appellant asserts that the Military Judge should have followed the joint submission of the parties or, at the very least, unequivocally advised them that he was considering imposing a harsher sentence and given them the opportunity to make additional submissions.

[16] The Respondent concedes the appeal of the sentence and joins the Appellant in requesting that the sentence of 30 days' imprisonment be replaced by a sentence of 30 days' detention. The parties also invite the Court to declare that the process established by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43, [2016] 2 S.C.R. 204 [*Anthony-Cook*] applies to joint submissions made following a trial.

III. The Conviction Appeal

A. *The Alleged Error*

[17] The notice of appeal alleges that the Military Judge erred in law by providing insufficient and unreasonable reasons concerning the Appellant's credibility. The Appellant claims that the Military Judge rejected his version of the facts on illogical grounds, which undermines the reasonableness of his verdict.

[18] The Military Judge provided detailed reasons when he found the Appellant guilty (*R. v. El-Zein*, 2021 CM 3012 [*El-Zein*]).

[19] First, in paragraphs 7 to 42, he reviewed the testimony of D.F. and of the Appellant. Second, in paragraphs 43 to 64, he outlined the applicable legal principles. Finally, in paragraphs 65 to 109, he analyzed the evidence in the light of these principles. He explained his

conclusions regarding the credibility of the witnesses and determined that the Appellant was not credible in his description of the sexual touching with D.F. He accepted D.F.'s version of events and concluded that the prosecution had met its burden of proof.

[20] The Appellant concedes that the Military Judge made no errors in his summary of the evidence or in his statement of the applicable legal principles, particularly concerning the burden of proof and the application of the rule of reasonable doubt in assessing the credibility of the witnesses. He asserts, however, that the Military Judge's analysis concerning credibility is vitiated by a fundamental illogicality that renders the conclusion unreasonable. He relies on the following excerpt from the reasons:

> [TRANSLATION]
>
> On this specific aspect of the evidence offered by Corporal El-Zein, the Court doubts the sincerity of the evidence, and as a result, its truthfulness.
>
> First, the accused never concealed his strong desire to engage in sexual activity with the complainant following her reply to his text message. He confirmed his eagerness for this to happen as quickly as possible, having interpreted that that was something that she desired. His testimony essentially reflects that of the complainant, that is to say, it was no longer an issue of whether she wanted it to happen because that aspect had already been decided in his mind, but rather when. He told the Court that he had been especially attentive to D.F.'s non-verbal responses to his sexual acts. Thus, the Court can conclude that it is on the basis of a lack of a refusal from of the complainant that the accused determined that he could go further, which renders the few observations that he made regarding certain actions and words of the complainant not very truthful in the circumstances.
>
> In addition, the complainant had made it clear to him that she was not interested in sexual activity until she knew the person with whom it might occur well, and to her own satisfaction, and Corporal El-Zein had himself confirmed this. This in and of itself, combined with the eagerness shown by the accused, raises a doubt

> as to the truthfulness of the facts that he allegedly observed as to the consent allegedly provided by the complainant.
>
> [*El-Zein*, paras. 88–90.]

[21] The Appellant is asking us to interpret this excerpt to mean that the conclusion of the Military Judge, who rejected his testimony, was based on three factors that in fact have nothing to do with the credibility of a witness:

> (1) his eagerness to engage in sexual activity;
>
> (2) the fact that he relied on a lack of a refusal from D.F. to conclude that he could proceed with sexual touching;
>
> (3) the fact that D.F. told him that she wanted to get to know someone better before having sexual contact.

The Appellant argues that in this respect the Military Judge's reasoning is illogical, which makes the Military Judge's conclusions regarding his credibility, and thus his verdict, unreasonable.

B. *Standard of Review*

[22] The test for whether a verdict is unreasonable is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered (*R. v. Yebes*, [1987] 2 S.C.R. 168, [1987] 6 W.W.R. 97).

[23] A verdict may also be unreasonable, even if supported by the evidence, if the trial judge reached it illogically or irrationally, as the Supreme Court of Canada recently explained:

> This may occur if the trial judge draws an inference or makes a finding of fact essential to the verdict that is plainly contradicted by the evidence relied on by the judge in support of that inference

> or finding, or shown to be incompatible with evidence that has neither been contradicted by other evidence nor rejected by the trial judge.
>
> [*R. v. C.P.*, 2021 SCC 19, 404 C.C.C. (3d) 217 [*C.P.*] para. 29.]

[24] The Appellant argues that this is the avenue of review that applies in this case. He also asserts that, in this situation, deference to the conclusions reached by the trial judge has no place.

[25] In our view, it is more accurate to state that an illogical or irrational conclusion cannot survive appellate review, even on a deferential standard of review. That said, the fact remains that a court of appeal must, generally speaking, show deference and restraint when it is called upon to review a decision that concerns the assessment of the credibility of witnesses. Indeed, the Supreme Court made this clear in *C.P.*:

> The . . . inquiry into illogical or irrational findings or inferences is not an invitation for reviewing judges to substitute their preferred findings of fact for those made by the trial judge. . . . Nor is it an invitation to unjustifiably interfere with a trial judge's credibility assessments. A court of appeal reviewing credibility assessments in order to determine whether the verdict is reasonable cannot interfere with those assessments unless they cannot be supported on any reasonable view of the evidence.
>
> [*C.P.*, para. 30.]

C. *Analysis*

[26] The Appellant bases his claim on three paragraphs of the Military Judge's decision, which he isolates from the rest of the decision. In our view, this approach to the issue, and the resulting claims, run counter to well-established principles in the case law.

[27] First, the reasons for a decision must be considered as a whole, and in the context of the record, the issues and the submissions of counsel at trial (*R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, paras. 37, 54 and 55).

[28] Second, the requirement to consider the reasons as a whole, taking into account the context, is particularly important when the assessment of credibility is at the heart of the decision:

> This Court has consistently admonished trial judges to explain their reasons on credibility and reasonable doubt in a way that permits adequate review by an appellate court. Having encouraged these expanded reasons, it would be counterproductive to dissect them minutely in a way that undermines the trial judge's responsibility for weighing all of the evidence. A trial judge's language must be reviewed not only with care, but also in context. Most language is amenable to multiple interpretations and characterizations. But appellate review does not call for a word-by-word analysis; rather, it calls for an examination to determine whether the reasons, taken as a whole, reflect reversible error. The task is to assess the overall, common sense meaning, not to parse the individual linguistic components. . . .
>
> [*R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621[*Gagnon*], para. 19.]

[29] In the same decision, the Court pointed out that the drafting of reasons relating to the credibility of witnesses sometimes poses a problem:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. . . .
>
> [*Gagnon*, para. 20.]

[30] Third, when the reasonableness of a verdict is in question, it is the conclusion that is reviewed, not the process followed to reach it (*R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, para. 58; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, para. 81). Thus, a verdict is not necessarily unreasonable because part of the reasoning that led to it is flawed.

[31] The Appellant is right to say that, according to his interpretation of paragraphs 88–90 of the Military Judge's reasons, which are quoted above, the Military Judge's reasoning was not logical. It is clear, for example, that there is no direct link between the credibility of a witness and that witness's eagerness to have sexual relations. However, we disagree with this interpretation.

[32] The Military Judge could perhaps have expressed himself more clearly, but we are of the view, taking into account the context and the decision as a whole, that he was simply seeking to explain his conclusion that certain aspects of the Appellant's version of events were implausible, given the rest of the evidence.

[33] It should be noted that the Military Judge also explained in detail why he found D.F.'s testimony to be credible and convincing. An acceptance, with supporting reasons, of evidence that contradicts the accused's version may form part of the reasons that can justify the rejection of that version (*R. v. J.J.R.D.*, [2006] O.J. No. 4749, para. 53; *R. v. R.D.*, 2016 ONCA 574).

[34] The central issue at trial was whether the prosecution had proven beyond a reasonable doubt that D.F. had not consented to sexual touching with the Appellant. The determination of

this issue depended entirely on the Military Judge's assessment of the credibility of the two witnesses. The Military Judge was aware of the applicable legal principles and the evidence presented and explained his conclusions in a detailed and comprehensive manner. In reviewing these conclusions, the Court must show deference. There are no grounds for intervening here.

IV. The Sentence Appeal

A. *Leave to Appeal Sentence*

[35] Leave is required to appeal sentence whether the appeal is by the Crown or the offender (see ss. 230(a) and 230.1(a) of the *National Defence Act*; ss. 676(1)(d) and 675(1)(b) of the *Criminal Code*). The Appellant's application for leave was heard at the same time as the appeal.

B. *The Hearing*

[36] The Appellant's sentencing hearing commenced on May 3, 2022. Crown and defence counsel advised the Court Martial that all of the evidence was being tendered by consent and that they were making a joint submission respecting sentence.

[37] The victim, D.F., read her impact statement to the Court Martial. It detailed the numerous ways the sexual assault has affected her, which included anxiety and inability to sleep; issues with the medication prescribed to manage these problems; chronic fatigue, which was limiting her employment opportunities; and hypervigilance, which eroded her trust in people, both civilian and military, whom she does not know. She also noted her perception that the military provided more support to the Appellant than it did to her. A written copy of her statement was filed in the Court record.

[38] Documents filed by counsel included a 13-page psychological report on the Appellant from Dr. Jean-Philippe Vaillancourt. Dr. Vaillancourt's report stated that the Appellant was rated by the actuarial instrument known as "Static-99R" as an average risk to reoffend, although Dr. Vaillancourt personally assessed the Appellant's risk as rather low.

[39] Defence counsel submitted a Joint Statement of Facts containing reports or statements from Marc-Antoine Pitre, a friend of the Appellant since 2014; Master Corporal Amal Sebti, the Appellant's immediate superior in the Royal Canadian Hussars during 2018–2019; Warrant Officer J.M.C.S. Poirier, the immediate superior of the Appellant during the spring of 2020; Anastasiya R. Kharlamova, a friend and counselor of the Appellant for the (almost) three previous years; and Geneviève DeClerq, the Appellant's supervisor of employment at Systèmes Danfreight Inc.

[40] Each of these witnesses, whether their connection to the Appellant was based on friendship, military service, non-military employment, or professional counselling, was very complimentary of the Appellant's work ethic, honesty, loyalty to the military as well as to friends and family, and personal integrity. The Appellant's own anxiety and his regret for having hurt D.F. were referenced. The reports and statements were referred to by counsel in their submissions to the Court Martial, and ultimately filed.

[41] Crown counsel addressed the aggravating and mitigating factors of the Appellant's offence. It was noted that the fact that the Appellant's victim was also a member of the military and the fact that the offence occurred in the operational theatre of the military were particularly

aggravating. Counsel also addressed the principles of sentencing governing the *Criminal Code* offence of sexual assault.

[42] Crown counsel strongly argued that a sentence which deprived the Appellant of liberty was required in order to show denunciation for the nature and order of the Appellant's offence and to deter others from engaging in similar conduct. Case law that indicated a period of incarceration for the type of sexual assault involved in the present case was discussed.

[43] The Military Judge was particularly interested in counsel's submission respecting the necessity for the Appellant's sentence to include some deprivation of his liberty. There was discussion between the Military Judge and Crown counsel concerning the distinction between detention and imprisonment in the Canadian Forces Service Prison and Detention Barracks ("CFSPDB") in Edmonton, Alberta. Counsel's position was that detention was more appropriate than imprisonment because detention at the CFSPDB detention wing would provide much more support for the Appellant's rehabilitation and reintegration into both military life and society than imprisonment would.

[44] Defence counsel agreed with Crown counsel's submissions. He also explained that Dr. Vaillancourt's assessment of the Appellant's medium risk to reoffend was based on statistical risk factors which were beyond the Appellant's control. Counsel emphasized that Dr. Vaillancourt's personal assessment was that the Appellant presented a minimal risk of reoffending. Defence counsel referenced jurisprudence that supported a deprivation of liberty by

way of detention rather than imprisonment for offences of a similar nature and degree as that of the Appellant.

[45] As noted above, counsel jointly submitted that the Appellant be sentenced to serve 30 days of detention in the CFSPDB facility, that he be demoted from Corporal to Private, that he be fined $5,000 by way of ten monthly payments of $500.00, and that he be made subject to legally required ancillary orders respecting a DNA sample and registration in the sex offenders' registry.

[46] Counsel relied on *Anthony-Cook* to support their position that their joint submission on sentence be accepted by the Military Judge.

[47] The Military Judge adjourned the sentencing hearing to consider the appropriate sentence.

C. *The Military Judge's Decision on Sentence*

[48] The sentencing hearing reconvened on June 15, 2022.

[49] The Military Judge accepted counsel's joint submission on sentence in every respect except that he ordered that the Appellant would serve 30 days in prison instead of 30 days in detention as counsel had submitted. The Military Judge distinguished *Anthony-Cook* from the case before him (Appeal Book, vol. III at 547) and declined to give the parties a second

opportunity to address the sentence, saying that the parties had already discussed the difference between detention and imprisonment at the sentencing hearing (Appeal Book, vol. III at 547).

[50] The Appellant was subsequently released on bail pending his appeal.

D. *The Appeal from Sentence*

[51] The Crown and the Appellant jointly appeal the Military Judge's sentence. They argue that the Military Judge ought to have alerted them to the fact that he was considering deviating from the joint submission by imposing a prison sentence and given them a second opportunity to address his concerns about their joint submission. They continue to rely on *Anthony-Cook* to support their position.

E. *Application for Leave to Appeal*

[52] The test for granting leave to appeal sentence is whether the party seeking leave establishes an arguable case for intervention or the appeal raises an issue of significance in either practice or law (*R. v. Hoekstra*, 2017 CMAC 5, 8 CMAR 212). In the instant case, the appeal raises valid questions on the scope of the law as set out in *Anthony-Cook* and *R. v. Nahanee*, 2022 SCC 37, 2022 CarswellBC 2985 [*Nahanee*]. The issues raised by the parties on appeal therefore raise an issue of significance in practice and in law, justifying the granting of leave to appeal sentence. Accordingly, leave is granted.

F. *Anthony-Cook, Nahanee, and Joint Submissions on Sentence*

[53] In *Anthony-Cook*, the Supreme Court of Canada ruled that a sentencing judge must be slow to reject a joint sentencing submission. The Court stated that accepting joint sentencing

submissions is very much in the public interest because they benefit the Crown, the accused, and the administration of justice. The Court described these benefits and explained that they are obtained because the accused has agreed to plead guilty, which assures the Crown of a conviction in exchange for the Crown agreeing to recommend a more lenient sentence.

[54] When such a negotiated agreement between the Crown and the accused is accepted by a sentencing judge, finality is brought to the proceedings, the parties and victim receive a substantial measure of closure, and strain on the justice system is considerably lessened. This positive outcome is realized only if the parties are assured that a sentencing court will almost certainly accept the joint sentencing submission.

[55] The Court went on to establish the legal test that a sentencing judge must apply and a framework that the judge must follow when the judge is considering rejecting a joint submission. The Court adopted the public interest test, which requires a sentencing judge to accept a joint sentencing submission unless the proposed sentence would bring the administration of justice into disrepute or is not otherwise in the public interest (para. 29). The Court further explained that:

> [34] . . . Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. . . .

[56] The framework the Court directed a sentencing judge to follow when deciding whether to reject a joint sentencing submission is that the judge must advise the parties of concern about

accepting the joint submission and give them an opportunity to respond to the concern by making additional submissions.

[57] The Court in *Anthony-Cook* was very clear that the *quid pro quo* in a joint submission requires the accused to have pleaded guilty. That said, at paragraph 36 of *Anthony-Cook*, the Court stated:

> [36] Accused persons benefit by pleading guilty in exchange for a joint submission on sentence (see D. Layton and M. Proulx, *Ethics and Criminal Law* (2nd ed. 2015), at p. 436). The most obvious benefit is that the Crown agrees to recommend a sentence that the accused is prepared to accept. This recommendation is likely to be more lenient than the accused might expect after a trial and/or contested sentencing hearing. Accused persons who plead guilty promptly are able to minimize the stress and legal costs associated with trials. Moreover, for those who are truly remorseful, a guilty plea offers an opportunity to begin making amends. For many accused, maximizing certainty as to the outcome is crucial — and a joint submission, though not inviolable, offers considerable comfort in this regard.
>
> [Emphasis added].

[58] Reading the "and/or" disjunctively, one could interpret the Court's words to mean that a sentencing court should give parties notice of concern about their joint submission and a second opportunity to address it even when they make a joint sentencing submission after a full trial.

[59] The only benefits that could be obtained from an uncontested sentencing hearing after a full trial would be that the sentencing hearing would likely be shorter than a contested sentencing hearing, thereby saving some time and effort for the parties and the justice system, and that there would be no sentence appeal. The only contribution that would be made by an offender would be to give up the right to argue for a lesser sentence. In such a case, the *quid pro quo* is qualitatively

different and of limited and considerably less benefit to the Crown and the administration of justice than the benefits described by Justice Moldaver in *Anthony-Cook*. Further, the Crown's sentencing proposal after a full trial is not likely to be as lenient to the offender as it would be were the offender to have pleaded guilty.

[60] *Anthony-Cook* varies significantly from this case. The offender in *Anthony-Cook* pleaded guilty to a serious offence, thereby providing a *quid pro quo* for the likely lighter sentence the Crown agreed to recommend. In this case, the Appellant did not plead guilty: D.F. was not spared the emotional cost of a trial, the Crown was not spared the risks, time, and expense associated with a trial, and the administration of justice was not spared the time and resources it expended conducting the trial. Furthermore, the Appellant did not accept any responsibility for the offence or take the opportunity to make amends to D.F. by pleading guilty. The fact that he was convicted after a full trial effectively negated the material benefits to the Crown and to the administration of justice, that Justice Moldaver described in *Anthony-Cook*. The Appellant only gave up the right to argue for a sentence that would be less than that jointly proposed, and did not provide the *quid pro quo* outlined in *Anthony-Cook*. Moreover, the Appellant's conviction appeal, which would normally be avoided by a joint submission that resulted from a guilty plea, exemplifies the distinguishing absence of efficiency and finality that is so much a part of the rationale in *Anthony-Cook*.

[61] The British Columbia Court of Appeal came to a similar conclusion in *R. v. Dunkers*, 2018 BCCA 363, 2018 CarswellBC 2565 [*Dunkers*]. In *Dunkers*, the defence agreed with the Crown's submission on sentence after a full trial. The Court ruled that their agreement on

sentence, arrived at by coincidence at the sentencing hearing, did not constitute a joint sentencing submission. In so ruling, the Court leaned heavily on the fact that the offender had not pleaded guilty and therefore there had been no *quid pro quo*, which could justify appellate intervention.

[62] In our view, for the above reasons, the law established in *Anthony-Cook* cannot be said to be engaged in this case, as the Military Judge stated. Moreover, the Supreme Court of Canada explicitly stated in *Nahanee* that the law set out in *Anthony-Cook* must remain confined to joint submissions that offer a *quid pro quo* for an accused's guilty plea (paras. 29–42). That is not this case.

[63] In *Nahanee*, the Supreme Court addressed a somewhat similar, yet different, argument involving *Anthony-Cook*. In *Nahanee*, the accused pleaded guilty to two offences of sexually assaulting children. There was no joint submission on sentence. Rather, the Crown sought a sentence of four to six years' imprisonment and Mr. Nahanee sought a sentence of three to three and a half years (para. 15). After a sentencing hearing, the judge sentenced the offender to eight years' imprisonment (para. 16). In so doing, she neither advised the parties that she was considering imposing a sentence higher than that proposed by the Crown nor gave them an opportunity to make additional submissions to justify their respective positions.

[64] On appeal, Mr. Nahanee argued that he ought to have been given a second opportunity to address sentence given that the sentence the judge imposed exceeded what the Crown proposed. He relied on *Anthony-Cook* to support his position.

[65] Despite the offender's guilty plea being his choice for his own reasons, which did not involve a *quid pro quo*, the Supreme Court of Canada ruled that it was an error in principle for the judge to have imposed a sentence greater than that sought by the Crown without having given the offender an opportunity to address the judge's concern about the Crown's proposed sentence.

[66] The Court stated that the purpose of giving the parties a second opportunity to further explain their positions is to provide the sentencing court with additional information which could impact the sentence imposed. The Court identified three circumstances that justify appellate intervention when a judge imposes a sentence harsher than that sought by the Crown: (1) when information which would have impacted sentence was missing from the first sentencing hearing, (2) when a sentencing judge fails to provide reasons, or provides unclear or insufficient reasons, for imposing a sentence harsher than that sought by the Crown, or (3) where a sentencing judge relies on flawed or unsupportable reasons (*Nahanee*, at para. 59).

[67] In the result, the Court ruled that the offender did not establish that there was information that could have been conveyed in a second hearing that would have impacted the sentence the judge imposed. Therefore, appellate intervention was not justified. Further, the Court stated that the sentencing judge's reasons disclosed no error and the sentence was not unfit.

[68] In this regard, it must be noted that the Supreme Court of Canada in *Nahanee* did not apply the strict public interest test and the framework it applied in *Anthony-Cook*. Instead, the Court ruled that it was an error for a sentencing judge to exceed the sentence proposed by the

Crown and applied the sentencing framework it had set out in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, and *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424.

[69] *Nahanee* involved an offender who pleaded guilty, although his guilty pleas were unrelated to any *quid pro quo*. The Appellant in this case did not plead guilty. While the fact that the Appellant did not plead guilty clearly precludes the application of *Anthony-Cook* to his case, it does not so clearly preclude the application of the framework set out in *Nahanee*. Accordingly, the question becomes whether an offender's plea makes a principled difference to whether the law set out in *Nahanee* can apply to this case.

[70] In *Nahanee*, the offender's guilty pleas were referenced in the Court's analysis of whether the judge erred (paras. 24–47, 62–65). However, the Court did not state that the offender's guilty pleas determined, were relevant to, or informed the Court's reason for ruling that the sentencing judge erred in principle when she imposed a sentence that exceeded the Crown's proposal.

[71] Guilty pleas always inform a Crown submission on sentence. Indeed, they also always inform defence submissions on sentence because guilty pleas are always a relevant mitigating factor. The fact that an offender has pleaded guilty does not make a sentencing proposal by the Crown immune from rejection. While the Crown is meant to represent the public interest in our justice system, as opposed to the interests of specific victims of crime, the submissions of Crown counsel do not always align with the law. In short, the Crown is not always right.

[72] The Supreme Court's ruling in *Nahanee* does not identify a principled difference between when a judge exceeds the sentence the Crown proposes for an offender who pleads guilty and when a judge exceeds the sentence the Crown proposes for an offender who pleaded not guilty and was found guilty after a full trial. In this context, we do not see a principled difference between these two situations. It seems to us that the Supreme Court's ruling that a judge errs when the judge imposes a sentence that exceeds what the Crown proposes applies equally to both situations. Moreover, if a judge errs when the judge exceeds the Crown's sentencing submission, surely the judge also errs when the judge exceeds a joint sentencing submission that has facilitated some benefit to the judicial process. We therefore see no reason why we cannot apply the legal framework set out in *Nahanee* to the Appellant's case.

G. *Application to the Present Case*

[73] In this case, the Military Judge imposed a sentence that exceeded the sentence proposed by the Crown. The fact that the Crown's proposed sentence was part of a joint sentencing submission does not alter the fact that the Military Judge exceeded the sentence proposed by the Crown.

[74] In this case, the Crown's submission on sentence, although jointly made with the Appellant, sought detention rather than imprisonment. The Military Judge did not advise the parties that he was considering exceeding the Crown's recommendation by imposing imprisonment rather than detention, nor did he give them a second opportunity to argue their joint submission on sentence. The Military Judge said that there would be no point in doing so because the parties had already been provided with an opportunity to discuss the difference

between their joint submission (detention) and the sentence he was considering imposing (imprisonment).

[75] While the parties had discussed the difference between detention and imprisonment in a broad sense at the sentencing hearing, that is different from such a discussion in the knowledge that the sentencing judge is considering rejecting the Crown's submission (or in this case the joint submission) for detention in favour of imprisonment. Additional and more specific facts may be brought to the attention of the court after the parties are specifically alerted to the judge's concern and consideration of exceeding the Crown's proposed sentence. At no point in the Military Judge's discussion with counsel did the Military Judge indicate that he was considering rejecting their joint submission that the Appellant be detained rather than imprisoned. Accordingly, the Military Judge erred in principle by failing to give notice to the parties that he was going to impose a sentence that exceeded what Crown counsel, indeed both counsel, had submitted, and in failing to provide counsel with a second opportunity to address the Court Martial in that knowledge.

[76] The question now becomes whether additional information could have been submitted at the second opportunity to address the Court Martial, which would have impacted the sentence imposed.

[77] At the appeal hearing, counsel explained more fully how imprisonment would have a much more serious effect on the Appellant than detention and that it would effectively end the Appellant's military career. Counsel explained that the stigma of prison, the seriousness of the

crimes committed by prison inmates, and the lack of military rehabilitative services offered in prison means that the vast majority of offenders who are imprisoned do not return to military service. By contrast, the CFSPDB detention wing provides rehabilitative support within the military environment and is equipped to enable an offender such as the Appellant to continue in his military career and be successfully reintegrated into society.

[78] The CFSPDB detention wing is a locked down barracks for Canadian personnel convicted of military offences and some *Criminal Code* offences. The panel was given to understand at the appeal hearing that it is a true detention wing in that there is no freedom to come and go. The CFSPDB detention wing is designed to penalize offenders but also to give them an opportunity for rehabilitation that enables their return to military service.

[79] The military personnel who are detained in the CFSPDB wing have been educated and trained in a military culture, and the Canadian government has invested significant resources in them. When their conduct or crimes are not so egregious that deterrence absolutely requires imprisonment, and when there is significant potential for rehabilitation within military life, it makes sense for them to be able to serve their sentence in a place and manner, which provides that opportunity.

[80] In the result, it is our view that the additional information respecting detention and imprisonment given at the appeal hearing, including the information concerning the effect of imprisonment on the Appellant’s ability to continue as a member of the military, would have impacted the sentence the Military Judge imposed.

[81] Further, there was considerable non-controversial evidence adduced by consent at the sentencing hearing that unequivocally speaks to the Appellant being able to continue in the military and his positive prospects for rehabilitation. This evidence provides a good measure of confidence that these objectives can be facilitated by enabling the Appellant to serve his sentence in detention rather than in prison. To deny the Appellant this opportunity to continue in the military would be too severe in the circumstances of this case.

[82] This decision is not to suggest that offenders who are members of the military ought to be excused from their wrongful conduct simply because they serve our country. Rather, it is to suggest that offenders whose conduct is deserving of some deprivation of their liberty, but who demonstrate a strong potential for rehabilitation and whose conduct was not so serious that they should lose their military careers, can be detained in a facility which provides an opportunity for rehabilitation within the military culture so as to equip them to continue in the military.

[83] Neither is this decision meant to minimize the nature and degree of the Appellant's crime and its effect on D.F. The focus of the Military Judge in sentencing the Appellant was the nature of the Appellant's offence and the necessity to send a message that sexual assault will not be tolerated in the military. His reasoning in that regard cannot be faulted. And, as the Military Judge noted, D.F. is also a member of the military, and she, too, must be supported in order for her to continue in the military.

[84] The military has invested considerable resources in both D.F. and the Appellant. D.F. testified that she feels now that she is being emotionally and professionally supported by the

military. The necessity of such support cannot be overstated, for it would be folly to invest effort and resources in offenders only, given the well-known continuing negative effects of sexual assault on victims. The wrong message would be sent not only to military personnel, but to all Canadians. It is also worth noting that the military's investment in D.F. was significant, as she had been a member of the military for some two years, whereas the Appellant was a comparatively new member.

H. *Disposition*

[85] Accordingly, we would grant leave to appeal the sentence, allow the sentence appeal, and vary the Military Judge's sentence of 30 days' imprisonment to 30 days' detention to be served in the CFSPDB detention wing. All other sentencing orders remain.

V. Amended Notice of Appeal

[86] At the hearing, the Appellant requested permission to file an amended notice of appeal to add a ground of appeal calling into question the impartiality of military judges. Such ground of appeal was dismissed by this Court in *R. v. Edwards*; *R. v. Crépeau*; *R. v. Fontaine*; *R. v. Iredale*, 2021 CMAC 2, *R. v. Proulx*; *R. v. Cloutier*, 2021 CMAC 3; *R. v. Christmas*, 2021 CMAC 7; *R. v. Brown*, 2021 CMAC 8 and *R. v. Remington*, 2023 CMAC 3. See also *R. v. Edwards*; *R. v. Crépeau*; *R. v. Fontaine*; *R. v. Iredale*, 2021 CMAC 2, leave to appeal to SCC granted, 39820 (February 2, 2023).

[87] The Appellant did not ask that this ground be argued in the present appeal. He simply asked that the issue be added to the record so that he might benefit from a favourable outcome

when the Supreme Court of Canada rules on it. At the hearing, we granted the Appellant permission to file an amended notice of appeal.

[88] Because this ground of appeal was not argued, it is dismissed.

VI. Conclusion

[89] The appeal of the conviction is dismissed. The sentence appeal is allowed and amended in accordance with paragraph 85 above.

"Lois R. Hoegg"
J.A.

"Louise A. Charbonneau"
J.A.

"I agree.
B. Richard Bell, C.J."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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REASONS FOR JUDGMENT BY:	HOEGG J.A. CHARBONNEAU J.A.
CONCURRED IN BY:	BELL C.J.
DATED:	AUGUST 3, 2023

APPEARANCES:

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