Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20170713

Docket: CMAC-589

Citation: 2017 CMAC 5

CORAM: **CHIEF JUSTICE BELL**
SCANLAN J.A.
GLEESON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CORPORAL HOEKSTRA

Respondent

Heard at Ottawa, Ontario, on May 11, 2017.

Judgment delivered from the Bench at Ottawa, Ontario, on May 11, 2017.

REASONS FOR JUDGMENT BY: GLEESON J.A.

CONCURRED IN BY: CHIEF JUSTICE BELL
SCANLAN J.A.

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REASONS FOR JUDGMENT

GLEESON J.A.

I. Overview

[1] The Respondent was sentenced for three offences contrary to section 130 of the *National Defence Act*, RSC 1985, c N-5 [*NDA*] and one count of receiving property obtained by the commission of a service offence knowing the property to have been so obtained, contrary to

section 115 of the *NDA*. The section 130 offences involved a single charge of possession, contrary to subsection 4(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [*CDSA*]; one count of unauthorized possession of prohibited devices with knowledge contrary to subsection 92(2) of *the Criminal Code*, RSC 1985, c C-46; and one count of possession of explosives without lawful excuse contrary to subsection 82(1) of the *Criminal Code*. As a result of these offences he was sentenced to a period of 60 days' imprisonment.

[2] The Crown appeals the sentence of 60 days' imprisonment on the basis that the Military Judge erred in applying the fundamental sentencing principle of proportionality and in the identification and consideration of mitigating factors. The Crown further submits the sentence is demonstrably unfit and seeks leave to appeal on this ground.

[3] On appeal, at the conclusion of the parties' oral submissions, the Court indicated that we were allowing the appeal, and varying the sentence from 60 days' to 14 months' imprisonment. We also indicated that the portion of the sentence not previously served was stayed. We advised the parties that reasons would follow. These are our reasons.

II. Background

[4] Corporal Hoekstra joined the Reserve component of the Canadian Armed Forces [CAF] as an infantryman in 2002. In 2006, he transferred to the Regular Force and served with the Canadian Special Operations Regiment [CSOR]. He deployed to Afghanistan on four separate occasions between December 2006 and July 2011. His superiors viewed him as a soldier having

outstanding potential. He was ranked amongst the top infantry corporals in Canadian Special Operations Forces Command.

[5] In August 2012, CAF ammunition was found for sale on a specialized gun website. The seller was ultimately identified as being Corporal Hoekstra. The military police executed a search warrant of his home seizing a large quantity of firearms, magazines, ammunition, grenades, military pyrotechnics, and other military equipment. They also seized approximately one pound of marijuana. The CAF property was valued at more than $39,000.

[6] In January 2016, Corporal Hoekstra pled guilty to the four offences set out above. At the suggestion of the Military Judge, the sentencing hearing was adjourned until July 2016 to allow for the completion of a psychological assessment of Corporal Hoekstra.

[7] In the course of the sentencing hearing, relying on the principles of denunciation, general and specific deterrence, separation of Corporal Hoekstra from society, protection of the public, and punishment, the Crown recommended a sentence of 18 months' imprisonment and dismissal from Her Majesty's Service. The Crown placed a particular emphasis on the principles of general deterrence and protection of the public, and provided the Military Judge with a number of cases in support of the recommended sentence. The Crown emphasized the dangerous nature of the property in Corporal Hoekstra's possession, together with the amounts of the ammunition and explosives. It also noted the careless manner in which the contraband items were stored and their proximity to public places, including schools.

[8] Before the Military Judge, Corporal Hoekstra's submission on sentence also identified general deterrence as the paramount principle for consideration. Defence Counsel highlighted that the guilty plea had spared the Court significant time and expense, and was indicative of Corporal Hoekstra's remorse. The Defence noted Corporal Hoekstra had been assessed as "a great soldier". It was submitted that the evidence showed that Corporal Hoekstra identified closely with the military's underlying ethos of duty and honour, and that his conduct had resulted in the loss of honour and trust within the CSOR. This was identified as being a significant negative consequence for Corporal Hoekstra. Defence Counsel acknowledged at trial that the offences were serious and that a custodial sentence was appropriate. They suggested a sentence of detention for 30 to 90 days to be suspended, a severe reprimand, and a fine in the range of $16,000 to $17,000.

III. Leave to Appeal Severity of Sentence

[9] As a preliminary matter, the Crown seeks leave to appeal the severity of sentence on the basis that it was demonstrably unfit.

[10] An appeal court may grant leave where 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 Laliberte*, 2000 SKCA 27 at paras 114, 118 and 119, 143 CCC (3d) 503). The Respondent does not oppose the request for leave and we are satisfied the Crown has demonstrated an arguable case to be advanced on the issue of the fitness of sentence. Leave to appeal sentence is granted.

IV. Issues

[11] The Crown contends the sentence was both demonstrably unfit and that the Military Judge committed a number of errors which warrant this Court's intervention. In light of our determination relating to the fitness of the sentence imposed, it is unnecessary to address the Crown's position that the Military Judge committed errors in principle.

[12] The following issues will be addressed:

i. Is the sentence demonstrably unfit?

ii. Is the re-incarceration of Corporal Hoekstra in the interests of justice?

V. Analysis

A. The Law

[13] The parties agree that the Supreme Court of Canada's decision in *R v Lacasse*, 2015 SCC 64, [2015] 3 SCR 1089 [*Lacasse*], should guide the Court in considering this appeal. *Lacasse* reiterates the principles long reflected in the law on sentencing and appellate intervention. Trial judges have a broad discretion to impose a sentence they consider appropriate within the confines of the law, and an appellate court should not intervene simply on the basis that it feels a different sentence ought to have been imposed (*Lacasse* at paras 39 and 40; *R v Nasogaluak*, 2010 SCC 6 at paras 43-46, [2010] 1 SCR 206; *R v Shropshire*, [1995] 4 SCR 227 at para 46, 129 DLR (4th) 657). A sentencing decision is only to be interfered with where there has been "an

error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors" impacting upon the sentence, or when the sentence imposed at trial is demonstrably unfit (*Lacasse* at para 41 citing *R v M* (CA), [1996] 1 SCR 500 at para 90, 105 CCC (3d) 327).

[14] Lacasse identifies the rationale for extending deference to a sentencing judge's decision, noting that the judge has had the advantage of observing the witnesses and hearing the parties' submissions. A sentencing judge is also usually familiar with the circumstances within the community in which the judge sits. This is a factor that is of particular relevance in the military justice system where Parliament has required that those appointed as military judges not only be experienced barristers or advocates, but they also be experienced and serving CAF officers (*NDA* s 165.21(1)).

[15] As noted above and re-affirmed in *Lacasse* a sentence may be found to be demonstrably unfit without a finding that the sentencing judge committed a determinative error in imposing sentence. This requires the appeal court to engage in an inquiry focusing upon the fundamental principle that a sentence be proportionate to the gravity of the offence, the degree of responsibility of the offender, and, reflect parity with sentences imposed in similar circumstances of offender and offence. Where an appeal court, after considering the circumstances of the offender, the gravity of the offences committed, the various principles and objectives of sentencing and, after comparison of the sentence imposed in similar circumstances, concludes the sentence was clearly unreasonable, manifestly excessive or manifestly inadequate, it may intervene.

[16] With these principles in mind we now consider the fitness of the sentence imposed in this case.

B. Was the sentence demonstrably unfit?

[17] In imposing sentence, the Military Judge identified the broad principles to be considered. He acknowledged the need for a sentence to be proportionate to the gravity of the offence, the responsibility and previous character of the offender, and the need for the sentence to be similar to those imposed on similar offenders, for similar offences, committed in similar circumstances. He also held that an offender should only suffer a deprivation of liberty as a last resort. The Military Judge noted that the sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances.

[18] In turning to the specific circumstances of the case, the Military Judge concluded that general deterrence and denunciation were the sentencing principles of primary importance. He noted that general deterrence seeks to not only deter the offender from reoffending, but also to discourage others from engaging in the same type of conduct. The Military Judge noted the evidence relating to Corporal Hoekstra's qualities as a soldier, and noted that his conduct had led to feelings, among his peers, of betrayal and dishonour to the unit. The Military Judge reviewed the expert evidence provided with respect to Corporal Hoekstra's mental health, noting that the report indicated Corporal Hoekstra met the diagnostic criteria for post-traumatic stress disorder, major depressive disorder, and that he had been diagnosed with alcohol abuse disorder. The Military Judge noted Corporal Hoekstra's expressions of remorse and shame together with the fact that he apologized in writing to members of the CSOR.

[19] The Military Judge identified the following aggravating circumstances: (1) the objective seriousness of the offences; (2) the breach of trust involved in light of Corporal Hoekstra's position as a member of an elite CAF unit; (3) the nature and quantity of equipment, explosives, and ammunition in his possession; (4) the extended period of time over which the offences had been committed; (5) the recklessness demonstrated through the manner of storage of these items in a residential home where he placed others at risk; and (6) that his knowledge and training placed him in a unique position to understand what he was doing was deeply wrong.

[20] With respect to the mitigating circumstances the Military Judge noted among others: (1) the guilty plea; (2) that he was a first time offender; (3) his outstanding performance as a member of the CAF; (4) his health issues; (5) his conduct subsequent to the laying of charges; and (6) the imposition of a criminal record resulting from the conviction.

[21] The Military Judge concluded that incarceration was an appropriate punishment, and that imprisonment was the only custodial sanction that was appropriate in light of the criminal nature of the offences. In determining the duration of the sentence, the Military Judge concluded that it would be counterproductive to Corporal Hoekstra's rehabilitation, and totally irrelevant in the circumstances of the case, to consider a long period of imprisonment. The Military Judge concluded that 60 days' imprisonment would be a fit and just sentence and that the circumstances did not justify suspending the sentence pursuant to section 215 of the *NDA*.

[22] An inquiry into the fitness of sentence "must be focused on the fundamental principle of proportionality … [a] sentence will therefore be demonstrably unfit if it constitutes an

unreasonable departure from this principle. Proportionality is determined both on an individual basis … and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate" (*Lacasse* at para 53).

[23] The Military Judge's primary focus in arriving at the length of sentence of imprisonment was the impact on Corporal Hoekstra's mental health and his future. Regardless of whether there were errors in the mitigating factors identified and considered, these mitigating considerations and the other principles of sentencing identified by the Military Judge needed to be meaningfully weighed against the aggravating circumstances. They were not. While the Military Judge identified aggravating and mitigating circumstances, they were not fully incorporated into the analysis in determining what would be a proportionate sentence. Circumstances including the potential lethal nature of the material, the risk to members of the general public, the attempt to sell ammunition to the public, and the breach of trust all needed to be addressed. The breach of trust was of particular relevance within the context of Corporal Hoekstra's service in an elite unit. The offences were committed within an institution that relies heavily upon trust, which is viewed up and down the chain of command as a fundamental feature of the military ethos.

[24] The Military Judge made no reference to sentences imposed for similar offences committed by similar offenders placed in similar circumstances. This, despite jurisprudence cited which demonstrated the imposition of significant periods of imprisonment where offenders were found in possession of prohibited weapons and devices and/or had abused positions of trust (*R v Bard*, 1986 ABCA 146, 72 AR 304; *R v Johnson*, 2014 BCSC 2226, 117 WCB (2d) 657; *R v*

Kennedy, 2016 MBCA 5, 334 CCC (3d) 68; *R v Loughrey*, 2002 CMAC 10, [2002] CMAJ No 10 aff'g 2001 CM 32; *R v Martin* (1995), 5 CMAR 302, [1995] CMAJ No 3; *R v Nascimento*, 2014 ONSC 6739, 118 WCB (2d) 206; *R v Nelson*, 1999 BCCA 737, [1999] BCJ No 2898; *R v Roussel*, 2014 ABQB 435, 116 WCB (2d) 304; *R v Rathburn*, 2013 YKTC 90, 111 WCB (2d) 393; *R v Smickle*, 2014 ONCA 49, 306 CCC (3d) 351 rev'g 2012 ONSC 602).

[25] Prior sentences and sentencing ranges are not binding on sentencing judges. This reflects the individualized nature of the sentencing process. However, where a sentencing judge determines that an appropriate sentence is one that is markedly more lenient or harsh than the sentences awarded in similar circumstances the judge has a duty to address the reasons for the disparity.

[26] In this case, the sentencing reasons are devoid of any consideration of what might be an appropriate punishment or why the sentencing precedents placed before the Military Judge were neither applicable nor helpful in the sentencing process. In addressing the parity principle, the Military Judge did not adopt a different range or reject a range previously considered in the jurisprudence. Precedents were not considered. The absence of any reference to relevant precedents by the Military Judge, together with the substantial divergence from comparable sentences, invites a probing consideration of the fitness of the sentence. It opens the door to a potential finding that the sentence is demonstrably unfit.

[27] As noted above, the jurisprudence would call for a period of imprisonment well in excess of 60 days for any one of the non CDSA offences for which Corporal Hoekstra was convicted.

Upon a review of the jurisprudence cited to the Military Judge, and on this appeal, we agree with the Crown's position that a sentence of imprisonment up to a maximum of two years less one day could have been justified in the circumstances. On appeal, Respondent Counsel candidly acknowledged the sentence was lenient. A sentence of 60 days' imprisonment in this case was clearly unreasonable, manifestly inadequate, and as such demonstrably unfit.

[28] Having reached this conclusion, we would not want these reasons to be read as a requirement for a sentencing judge to engage in a detailed recital of all elements of the proportionality principle or all the factors relevant to sentencing in every case. This is neither practical nor necessary. However, where general deterrence and denunciation are identified as the focus for sentencing, the failure to directly address proportionality through the active weighing of the aggravating and mitigating factors in the context of similar offences and similarly situated offenders erodes the credibility of the system. This is particularly so where a markedly more lenient or harsher sentence is imposed.

[29] Having found the sentence to be demonstrably unfit, it is now for this Court to impose a fit sentence. In doing so we have: (1) considered the circumstances of the offences; (2) weighed the compelling mitigating factors against the aggravating circumstances, including the time period over which some of the offences occurred, the breach of trust, the danger to which members of the public were exposed, and the attempt to profit from the public property; and (3) considered the jurisprudence. After considering all of these factors, the Court is of the unanimous opinion that a sentence of 14 months' imprisonment is an appropriate sentence.

C. Is the re-incarceration of Corporal Hoekstra in the interests of justice?

[30] The Respondent submitted that should this Court lengthen Corporal Hoekstra's sentence the Court should also stay the operation of any further period of incarceration beyond the 60 days already served. In support of this position, the Respondent seeks to place fresh evidence before the Court. The Crown does not object to the admission of that evidence and agrees that a stay would be appropriate.

[31] The fresh evidence Corporal Hoekstra seeks to admit demonstrates that he has made substantial rehabilitative progress, that he remains in military service as a member of the Reserve component, and that he holds civilian employment. The fresh evidence consists of four letters: one authored by the Commandant of the Canadian Forces Service Prison and Detention Barracks [CFSPDB], one authored by his current Commanding Officer, and two authored by current civilian employers.

[32] The Commandant of the CFSPDB's letter attests to Corporal Hoekstra's outstanding conduct and leadership as a service prisoner, as well as his strong desire to rehabilitate himself and become a productive and worthwhile member of the CAF. His Commanding Officer similarly notes Corporal Hoekstra's leadership and adherence to the values of the CAF "during and post these legal proceedings". His Commanding Officer recommends, in the strongest terms, against re-incarceration. His civilian employers affirm his status as an employee, and in one case, speaks to the significant and key role he plays in the operation and growth of a viable small business.

[33] The Respondent's fresh evidence is admitted. It is directly relevant to the question of whether the remainder of the sentence should be stayed. The evidence was not available at the time of sentencing, and the Crown suffers no prejudice through its admission.

[34] The parties do not question the authority of this Court to stay the execution of the remainder of the sentence. In support of a stay, the Respondent argues that re-incarceration would not serve any societal interest, nor advance the principles of deterrence and denunciation. As noted above, the Crown in its submissions agreed that in the circumstances of this case it would be appropriate to stay the execution of any further period of incarceration.

[35] The Supreme Court of Canada has confirmed that reviewing courts may grant orders staying the execution of a custodial sentence (*R v Proulx*, 2000 SCC 5, [2000] 1 SCR 61 [*Proulx*]; *R v RNS*, 2000 SCC 7, [2000] 1 SCR 149 [*RNS*]; *R v RAR*, 2000 SCC 8, [2000] 1 SCR 163 [*RAR*]). In *R v Veysey*, (2006 NBCA 55, 303 NBR (2d) 290), the Court undertook an extensive review of the law pertaining to stays of execution of fit sentences and at paragraph 18 specifically examined *Proulx*, *RNS*, and *RAR*. It held that requiring an offender who has previously served a demonstrably unfit sentence to then serve a fit sentence is neither inherently harsh nor oppressive. However, the Court in *Veysey* recognized that in special circumstances this may lead to an injustice. In identifying those special circumstances it stated at paragraph 32:

> What constitutes special circumstances? Having regard to the jurisprudence discussed above, we have isolated four factors that one could reasonably consider relevant to the issue of whether a stay should be granted. This is not to suggest that the list is exhaustive. Other pertinent factors may exist. However, for purposes of deciding this appeal, we are content to examine the following: (1) the seriousness of the offences for which the offender was convicted; (2) the elapsed time since the offender

> gained his or her freedom and the date the appellate court hears and decides the sentence appeal; (3) whether any delay is attributable to one of the parties; and (4) the impact of reincarceration on the rehabilitation of the offender.

[36] In this case the offences are unquestionably serious. Corporal Hoekstra has fully served the sentence imposed at courts martial and was released on September 5, 2016. Attribution of delay is not an issue. The determinative factor, in this case, is the impact on the offender.

[37] The fresh evidence establishes that Corporal Hoekstra has made significant progress in rehabilitating himself, and that he has re-established himself as a valued and contributing member of both the military and civilian communities. While the Crown was of the view that the sentence, as previously imposed, undermined the principles of deterrence and denunciation, it took the position that the imposition of a fit sentence was all that was required to address this concern. The Crown concurred with the Respondent in suggesting there was no requirement to have Corporal Hoekstra serve the remaining sentence in prison.

[38] In the circumstances, the Court is of the unanimous opinion that the portion of the 14 month sentence of imprisonment not previously served should be stayed.

VI. Conclusion

[39] For the reasons set out above: (1) the Crown is granted leave to appeal the severity of sentence; (2) the appeal is allowed, the sentence being found to be demonstrably unfit; (3) the sentence is varied by imposing a sentence of 14 months' imprisonment; (4) the Respondent's

motion for the admission of fresh evidence is allowed; and (5) the execution of that portion of the sentence in excess of the period of imprisonment previously served is stayed.

"Patrick Gleeson"
J.A.

"I agree
B. Richard Bell, C.J."
"I agree:
J. Edward Scanlan, J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-589
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. CORPORAL HOEKSTRA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 11, 2017
REASONS FOR JUDGMENT BY:	GLEESON J.A.
CONCURRED IN BY:	CHIEF JUSTICE BELL SCANLAN J.A.
DATED:	JULY 6, 2017

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