Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20230221

Docket: CMAC-624

Citation: 2023 CMAC 1

[ENGLISH TRANSLATION]

CORAM: **BELL C.J.**
DOYON J.A.
GLEESON J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

PRIVATE A. BRUYÈRE

Respondent

Heard at Québec, Quebec, on January 17, 2023.

Judgment delivered at Ottawa, Ontario, on February 21, 2023.

REASONS FOR JUDGMENT BY: DOYON J.A.

CONCURRED IN BY: BELL C.J.
GLEESON J.A.

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REASONS FOR JUDGMENT

DOYON J.A.

I. Introduction

[1] Sentencing is an art that bears no resemblance to science: *R. v. Parranto*, 2021 SCC 46, at para. 9. Rather, it brings to mind a detailed work of embroidery made up of a myriad of tiny stitches.

[2] The principle of individualization, which underlies the search for a proportionate sentence, requires that a number of factors that the trial Judge heard firsthand be taken into consideration. For this reason, deference is owed to the trial Judge, and appellate courts must therefore exercise restraint.

[3] Judges are obviously required to take into account all of the relevant factors and circumstances. That is what the Military Judge did in this case even though the sentence that she imposed, following an oral judgment that was thorough, detailed and approximately 30 pages in length, might seem lenient.

II. Background

[4] After a guilty plea was entered, the Military Judge found the Respondent guilty of common assault (paragraph 266(a) of the *Criminal Code*; paragraph 130(1)(b) of the *National Defence Act*), which was committed in December 2018 against his girlfriend, and of an offence under the *Code of Service Discipline* for having fought, at the time of these incidents, with a Canadian Forces corporal. It should be noted that initially, the Respondent had been accused of assault causing bodily harm (paragraph 267(b) of the *Criminal Code*), but the prosecution consented to a guilty plea with respect to the included offence of common assault.

[5] The incidents occurred in Cuba during a personal trip that the Respondent took with his girlfriend, a member of the Canadian Forces as well.

[6] During a violent argument, the Respondent struck the victim repeatedly on the head and body while holding her down on the bed. The victim broke free from his grasp, but the Respondent caught her and hit her again. When she returned to the room a little later to retrieve her personal effects, he kicked her repeatedly and choked her. She managed to escape and took refuge elsewhere in the hotel. These incidents resulted in blood being visible on one of her arms.

[7] At the end of the evening, the Respondent went after the victim again; he also attacked a Canadian Forces corporal, who was on a personal trip as well and who was trying to protect the victim. The next day, hematomas were visible on both of the victim's eyes.

[8] It must be clarified that the guilty plea is important. In spite of everything, the Appellant is of the opinion that—taking into account all of the circumstances, including the bodily harm, if any—the sentence should be the same whether a guilty plea was entered with respect to a charge of common assault or with respect to a charge of assault causing bodily harm. This submission is surprising.

[9] First, the objective seriousness of the offence is important in determining the appropriate sentence. However, this objective seriousness is generally brought into focus by the maximum sentence, namely, five years' imprisonment for common assault (paragraph 266(a) of the *Criminal Code*) and 10 years' imprisonment for assault causing bodily harm (paragraph 267(a) of the *Criminal Code*) in this case. As objective seriousness is a factor that must be considered in all cases, this difference will necessarily have an impact on sentencing. The analysis cannot be carried out in the same manner if the maximum sentence for one criminal offence is double the sentence for the other.

[10] Second, the guilty plea limits the relevance of the underlying facts of the offence as well as the facts that can be admitted into evidence. The Respondent has admitted to having committed assault, but there has been no admission as to the existence of bodily harm; therefore, this bodily harm could not be taken into account in determining the appropriate sentence even if there had in fact been bodily harm.

[11] Now that this clarification has been made, here is the punishment that the Military Judge imposed on the Respondent on February 24, 2022, following a four-day sentencing hearing during which expert reports were submitted and several witnesses were heard: the Judge refused to grant the absolute discharge or, alternatively, to impose the $1,000 fine that the Respondent was seeking and sentenced him to a severe reprimand, along with a $3,000 fine. The Appellant, who had instead proposed a 90-day sentence of imprisonment, is therefore seeking leave to appeal.

III. Analysis

[12] *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 states the following at paragraph 11:

> … except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.

[13] In this case, the Appellant has made no argument of the nature described in *Lacasse*. Although he claims that the sentence is demonstrably unfit and that the Military Judge also made several errors in principle, his submissions as a whole show that he is mainly, if not exclusively, contesting the leniency of the sentence, which is obviously not an acceptable ground of appeal.

A. *Sentencing range*

[14] The Appellant underscores the sentencing range established by the Judge. In his view, this range is incorrect because the Judge failed to take into account judgments and decisions rendered within the civilian justice system. The Appellant is wrong.

[15] The Appellant is of the opinion that imprisonment is required. His submissions suggest that imprisonment would be the only appropriate sentence if a suitable range—namely, sentences varying from three to seven months' imprisonment—were to be relied on. He cites *R. v. Forsyth*, 2003 CMAC 9, 6 CMAR 329 in support of his position. A desire to make imprisonment a minimum sentence can even be sensed.

[16] The Judge instead adopted a range of a fine, combined with a reprimand, to eight months' imprisonment. These two ranges are not so dissimilar save for the lower end of the ranges, with the understanding that in any case, these ranges cannot be binding.

[17] The argument is astonishingly rigid. A range of sentences is not a limitation; rather, it is only a guideline that may be breached in the search for a proportionate individualized sentence. In this regard, the Appellant adds that the Judge did not sufficiently explain why she departed from the range that he proposed.

[18] In any event, the Judge took *Forsyth* into consideration; that decision, which the Appellant relied on, dismissed the accused's appeal relating to an eight-month sentence of imprisonment. I note that when an appeal regarding a sentence is dismissed, this means that the

sentence is not demonstrably unfit or tainted by an error in principle. That sentence should not be confused with the sentence that the appellate court itself would have imposed.

[19] Regardless, *Forsyth* must be distinguished from the present case. First, that case concerned a charge of assault causing serious bodily harm, which is very different from the circumstances of the present appeal and which led to the application of a range of three to 18 months' imprisonment.

[20] Second, Mr. Forsyth had not pleaded guilty.

[21] The Appellant also relies on *R. v. Buuck*, 2020 NLPC 1319A00706, 2020 CanLII 91945 (one-year sentence of imprisonment). However, the accused in that matter was convicted of a charge of assault with a weapon, which is different from the circumstances of the present case. Furthermore, Mr. Buuck had a criminal record whereas the Respondent does not. Lastly, in order to determine the appropriate range, the Judge in that case cited *R. v. Saunders*, 2018 NLSC 227, in which the granting of an absolute discharge was ordered. In short, that judgment does not in any way support the Appellant's argument as regards the range and, rather, makes it possible to conclude that the range that he is suggesting is not the right one.

[22] The Military Judge also took into account *R. v. Rumbolt*, 2019 CM 2028 (guilty plea with respect to assault causing bodily harm to his girlfriend, severe reprimand and $5,000 fine) and *R. v. Simms*, 2016 CM 4001 (assault and threats, reduction in rank and $4,000 fine). Contrary to the Appellant's arguments, there are therefore comparable decisions within the military justice system.

[23] It is true that the sentence in *Rumbolt* was the result of a joint submission, and this must be taken into consideration. However, the Judge in that case carefully analyzed the relevant case law before giving effect to the agreement, which led her to express her assent in the following way: "… I agree with the recommendation that a non-custodial sentence in this case is warranted". This is therefore not a situation in which a judge adopted a joint submission solely because a standard of review greatly limited his or her discretion. In other words, it can be presumed that in that matter, the Judge would have imposed such a sentence even in the absence of a joint submission, which is an important finding that makes it possible to take that judgment into account in establishing the applicable range. It goes without saying that the existence of a joint submission must be considered but that it can never, on its own, justify rejecting a sentence for the purposes of determining the applicable range. In light of the circumstances, Rumbolt could therefore be used to identify the range.

[24] Furthermore, I note that in that matter, the facts of which bear a great resemblance to the facts of the present case, the Judge stated the following:

> [34] Based on the facts of this case, had it not been for the guilty plea and the significant efforts that Master Seaman Rumbolt has invested in his personal rehabilitation, the Court would have had hesitation accepting a non-custodial sentence. However, the joint submission takes into account very significant mitigating factors and recognizes the positive steps taken by him, which are important. Significant credit is appropriate in these circumstances and hopefully his example will serve to inspire and motivate other members who might find themselves in a similar situation to take concrete steps to turn their lives around.

[25] These statements can be transposed to the present case.

B. *Civil justice system judgments*

[26] In terms of the application of the civil justice system decisions and judgments that the Appellant relied on at trial, the Military Judge did not in any way fail to take them into consideration notwithstanding the claims of the Appellant, who contends that she set [TRANSLATION] "the civilian court decisions aside without considering them". On the contrary, she made sure to distinguish them by providing specific examples in order to explain that she could not rely on most of them. She is correct: these decisions can easily be distinguished.

[27] Moreover, she was justified in underscoring the military justice system judgments. She followed *R. v. Darrigan*, 2020 CMAC 1, which contains the following passage:

> [26] I will begin my analysis by emphasizing the importance of a separate system of military justice in preserving discipline, efficiency and morale. This function is of course essential in maintaining a state of readiness on the part of the Canadian Armed Forces in the defence of our nation's security. Respectfully, the Crown's attachment in this appeal to the civilian model of sentencing ignores the fundamental role of Canada's military and the disciplinary code which binds its members.

[28] In sum, the judge considered both the civilian and military case law, and she cannot be criticized of erring in any way in this regard. The principles of parity and uniformity in sentencing were adhered to in every way as part of a detailed and full review of the evidence, the legislation and the relevant military and civilian case law. It is therefore unnecessary to give additional directions with respect to the use of civilian justice system judgments, as requested by the Appellant.

C. *Adopted principles and factors*

[29] The Military Judge also attentively reviewed all of the circumstances of the case in order to describe the aggravating and mitigating factors that she adopted:

(1) Aggravating:

- physical and psychological harm that the victim suffered;
- financial harm and damage to her career;
- victim's vulnerability at the time of the assault;
- intimate relationship between the Respondent and the victim;
- breach of trust;
- number of acts of violence; and
- alcohol intoxication.

(2) Mitigating:

- Respondent's young age and junior rank;
- lack of criminal record; and
- guilty plea.

[30] She described with precision the expert evidence and the Respondent's mental state at the time of the offences, as well as the sustained efforts that he subsequently made in order to remedy the situation. He barely drinks anymore, and since the time of the incidents, he has been diagnosed with borderline personality disorder, specifically in April 2021. In other words, he was not very informed about his condition—specifically, about the toxic relationship between alcohol consumption and his mental state—at the time of the offences, although he was aware that he had mental health issues. He is now taking medication, is stable and is undergoing treatment, and his risk of reoffending is very low. The Judge had these facts in mind in determining the

appropriate punishment, and she had to—as she did—take them into account without placing undue emphasis on them or giving them inordinate weight.

[31] All of the guiding principles were applied. She stated as follows in her oral judgment:

> [TRANSLATION]
>
> It has been recognized in the case law that for this type of crime, the objectives of denunciation as well as general and specific deterrence should take precedence in determining the punishment. For this reason and for the reasons that I will explain later on, I accept that it is these objectives that prevail in the present case. Nevertheless, this does not mean that the Court must disregard the other objectives, such as the offender's reintegration into the community. Especially in your case, as you have taken serious steps to address the issues that you were and are still facing. Indeed, sentencing remains an individualized process, as I have already mentioned.

[32] Therefore, it cannot seriously be contended that the Military Judge failed to review the principles of denunciation and deterrence, whether this deterrence be general or specific. These principles do not call for a prison sentence, especially given that the Respondent's reintegration into the community has begun and that treatment seems to be successful.

D. *The Military Judge's analytical approach and the conclusion*

[33] The Military Judge correctly applied the principles of sentencing, particularly those set out in sections 203.1 to 203.3 of the *National Defence Act*.

[34] In reviewing the possibility of imposing a less restrictive punishment than imprisonment, she followed the approach set out by the legislation by considering the other options available to

her. After ruling out the absolute discharge that the Respondent was requesting, as well as a reprimand, she determined that a fine coupled with a severe reprimand was a proportionate punishment and that imprisonment was not necessary. In doing so, she carried out her mandate.

[35] In short, this appeal goes to the very heart of the trial judge's discretion and does not point to any error that could justify this Court's intervention.

[36] For these reasons, the application for leave to appeal is allowed, but the appeal is dismissed.

"François Doyon"
J.A.

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

"I agree.
Patrick Gleeson, J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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