Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20100420

Docket: CMAC-524
CMAC-526

Citation: 2010 CMAC 4

CORAM: **SHARLOW J.A.**
BENNETT J.A.
TRUDEL J.A.

BETWEEN:

Docket: CMAC-524

LEADING SEAMAN SYLVIA REID

Appellant

and

HER MAJESTY THE QUEEN

Respondent

AND BETWEEN:

Docket: CMAC-526

LEADING SEAMAN JANET SINCLAIR

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on March 12, 2010.

Judgment delivered at Ottawa, Ontario, on April 20, 2010.

REASONS FOR JUDGMENT BY:	BENNETT J.A.
CONCURRED IN BY:	SHARLOW J.A.
	TRUDEL J.A.

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REASONS FOR JUDGMENT

BENNETT J.A.

Introduction

[1] This is an appeal from a sentence imposed on 9 February, 2009, in Esquimalt, B.C. before a General Court Martial. Petty Officers Second Class Silvya Reid and Janet Sinclair pleaded guilty to damaging Her Majesty's Property, to wit: a database icon, and were each sentenced to a reduction in rank to Leading Seaman and fined $3,000. Then-PO2 Sinclair was also given a severe reprimand in recognition of her role in directing the offence.

[2] Both appeal from the severity of the sentence, and in particular the reduction in rank. They allege errors on the part of the sentencing judge which they submit resulted in a sentence disproportionate to the offence. The appeals were heard together, and I have analyzed the issues as if they apply to each of the appellants.

Facts

[3] The charges on this court martial arise from events that occurred in Ottawa on 16 July 2007. Leading Seaman Sinclair and Leading Seaman Reid (both then Petty Officers 2nd Class) were employed at the National Defence Command Center (NDCC) in Ottawa. LS Sinclair was posted to NDCC on 17 May 2004, and LS Reid was posted to NDCC on 25 August 2006. The appellants are married.

[4] The appellants were Information Management NCMs, or IMNs for short. As IMNs, they were responsible for maintaining and monitoring computer information management

telecommunications systems that fed information in and out of NDCC. One such system was the Processor Displays Subsystem Migration (PDSM), which reports on missile and space events around the globe. This system is shared with the United States through NORAD. When LS Sinclair first arrived at NDCC, there was no means for the end-users of the information provided by the PDSM to access it directly. Information was copied by hand from the PDSM, retyped manually into an email in another system, and sent to the end-users. The end-users were, among others, the Minister of National Defence and the Chief of Defence Staff.

[5] LS Sinclair, of her own initiative, had developed an application to facilitate the end-users' access to the PDSM using Microsoft Access. Her application enabled end-users to search and view data that would otherwise have to be manually typed into an email by a member of the watch and sent to them. It was LS Sinclair who was principally responsible for maintaining the application. The application created by LS Sinclair significantly improved the timeliness of PDSM reporting.

[6] LS Reid was posted to NDCC on 25 August 2006. She was one of three new personnel assigned to LS Sinclair for training. Both quickly became upset and frustrated with what they perceived as a lack of diligence and work ethic in the other two new co-workers. LS Reid often found herself completing routine tasks that should have been performed by the person on shift before her. At some point she did complain orally to a superior, to no effect.

[7] LS Sinclair was frustrated by the slow progress of the new personnel and what she perceived as their laziness. She made complaints about their failure to complete work that were not addressed.

[8] While on shift, LS Reid would often chat over MSN with LS Sinclair who was, at the time of the offence, at home expecting their first child. These MSN conversations were recorded without the knowledge of the appellants and were reproduced at the sentencing hearing. They show that LS Reid and LS Sinclair planned to interfere with the database, and that it was LS Sinclair who told LS Reid how to do so.

[9] Following LS Sinclair's instructions on MSN chat, on 16 July 2007, LS Reid damaged the icon that allowed access to the application that LS Sinclair had created. Before she did, she created a backup of the database on a CD. At the end of her shift, LS Reid wrote an electronic handover note indicating that she had had a problem with the database and was unable to fix it.

[10] An investigation ensued, and was referred to the Canadian Forces National Investigation Services (CFNIS). On 7 and 8 August 2007 CFNIS executed a search warrant on LS Reid and LS Sinclair's home, and seized 86 items deemed capable of storing digital media, including digital cameras, cell-phones, and gaming equipment. These items were retained by CFNIS until September 2008, when they were returned at the request of counsel for the appellants. In the meantime, the appellants had replaced many of these items at a cost of approximately $5000.

[11] A Damage Assessment Report prepared in early August 2007 indicated that only the icon providing a link to the PDSM database was damaged, making the program created by LS Sinclair inaccessible. The database was still accessible using the methods that were used before LS Sinclair had created the application. Repairing the system cost $536 and 4 person hours.

[12] In a statement given to military police on 8 August 2007, LS Reid said that she removed the icon in order to see if anyone else on the unit could fix it, and that she didn't want to leave the application that LS Sinclair had created with the unit. In cross-examination, LS Reid said that she damaged the icon in order to get back at her co-workers.

[13] Charges were laid on 5 August 2008. LS Reid and LS Sinclair were initially charged with sabotage, conspiracy, mischief to data, and wilful damage to property. Following a post-charge review by the Director of Military Prosecutions, the conspiracy and sabotage charges were dropped in September 2008. In the meantime, however, news of the charges had been released to the media. The charges received significant national media attention, and at the hearing the appellants testified as to the public shame and humiliation that this coverage caused them. After the charges were reduced, counsel for the appellants successfully applied to the Director of Military Prosecutions to issue an updated news release noting the change to the charges. The remaining outstanding charges were i) negligently performing a military duty imposed on her, ii) mischief to data and iii) wilfully damaged property of Her Majesty's Forces. Counts one and two were withdrawn at the request of the Prosecutor. Both appellants pleaded guilty to count

three which was amended to read: In that she, on or about 16 July 2007, at or near Ottawa, Ontario, damaged property of Her Majesty's Forces, to wit: a database icon.

[14] LS Sinclair served in the armed forces for just over 22 years and LS Reid had been in the armed forces for just over 15 years at the time of sentencing. They had been married to each other for two and a half years at the time of sentencing. They have two children: a daughter born shortly after the commission of the offence, and a son who was born shortly after the sentencing hearing. LS Reid did not have a disciplinary or criminal record prior to this offence. L.S. Sinclair did not have any related records. Both had very good service records.

Analysis

[15] The standard of review on a sentencing appeal was expressed by the Supreme Court of Canada in *R. v. C.A.M.*, [1996] 1 S.C.R. 500, at para. 90:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

[16] The appellants have raised several issues on appeal. In summary, they say that the military judge erred in (1) treating the appellants' family and financial situation as a neutral factor, (2) finding that the situation at NDCC following the offence amounted to an "internal crisis", (3) overemphasizing the unrealized risks of their actions as an aggravating factor, and consequently (4) failing to consider the minimal impact of the offence as a mitigating factor, (5) failing to reduce the sentence in recognition of the punishment already suffered by way of media

attention, (6) failing to effect a reduction in sentence in recognition of the conduct of military officials in the course of the investigation and (7) imposing a sentence which was disproportionate to the offence resulting in an unfit sentence.

(1) Failing to consider the appellants' family and financial situation as a mitigating factor

[17] The military judge said in his reasons for sentence that the offenders' family situation and the attending compounded financial consequences of any reduction in rank was a neutral factor because "sentences imposed on offenders will always impact on their family."

[18] I agree with the appellants that this was an error in principle. The financial impact of a sentence will impact different offenders differently. Where, as in this case, an offender is responsible for the support of a young family, financial consequences are not a neutral factor. The fact that the offender has financial responsibilities for a family will aggravate the consequences of a reduction in pay, and will often constitute a mitigating circumstance. In unusual circumstances like the present where two offenders are mutually responsible for the support of a family, the impact of a simultaneous reduction in pay for both parents cannot be ignored. The appellant is correct in contending that this should have been treated as a mitigating factor. The question then becomes whether this error in principle led the judge to impose a sentence that was disproportional or unfit. This is a separate question which will be addressed below. See *R. v. Johnson* (1996), 112 C.C.C. (3d) 225 (B.C.C.A.) at para. 37.

(2) Finding that the situation at NDCC following the offence amounted to an "internal crisis"

[19] The appellants allege that the military judge erred in overemphasizing the risk to national security created by their actions. Three sub-issues arise from this ground of appeal. First, the appellants take issue with the military judge's finding that the appellants' interference with the database created an "internal crisis" at NDCC. The appellants argue that this finding should not be permitted to stand because it is supported only by hearsay evidence of NDCC's witnesses at trial. Second, they submit that it was an error in principle to consider the unrealized risks of their actions as an aggravating factor. Third, the appellants submit that the military judge erred in not taking the minimal actual damage caused by their actions as a mitigating factor in sentencing. In their submission, the sentence does not reflect and is disproportionate to the lack of actual harm caused.

[20] The impugned part of the military judge's reasons are as follows:

> Objectively, this is not a very serious offence. However, as I explained earlier, the damage caused to Her Majesty's Property occurred in circumstances that not only impeded the timeliness of NDCC to perform its task for a two-week period, but more importantly it brought into doubt the level of accuracy of the information passed to the senior leaders of the department and other interested parties, as well as raising concerns with the ability of NDCC to perform its very mission. The offenders' actions temporarily caused a level of uncertainty at the highest echelons of NDCC to the extent that they were concerned that their shortcomings could impact on national strategy if late or bad decisions would have been made by the decision-makers as a result. The offenders, through their actions, created an internal crisis within NDCC by inserting doubt into an organization that must rely on ultimate accuracy to properly inform the decision-makers of the Department of National Defence...Unlike counsel for PO2 Sinclair, the court finds the subjective gravity of this offence very serious in the circumstances. [Emphasis added]

[21] In relation to the first submission, that the judge erred in finding an "internal crisis", the standard of review is one of palpable and overriding error. A court of appeal will not interfere with a finding of fact by a trial judge (and by extension, a sentencing judge) where there was some evidence properly before the judge on which he could have based his finding: *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 10, 18, 25; *R. v. Clark,* 2005 SCC 2, [2005] 1 S.C.R. 6 at para. 9.

[22] The appellants contend that there was no evidence on which the military judge could have based his conclusion that the deletion of the icon created an "internal crisis" at NDCC. The evidence shows that there was little immediate impact of the deletion of the icon, and that any harm to NDCC or to national security was purely theoretical and remains unrealized.

[23] The military judge had the benefit of hearing the evidence of two NDCC witnesses as to the impact of the offence, Lieutenant Colonel (LCol) Heuthorst and Lieutenant Commander (LCdr) McCallum. Both gave evidence as to the impact of the offence on operations at NDCC.

[24] The appellants submit that the sentencing judge should have placed greater weight on the evidence of LCdr. McCallum, who was at NDCC Ottawa at the time of the relevant events. The appellants stress LCdr. McCallum's evidence that the deletion of the icon was not mentioned at the morning briefing on July 16th, 2007, or at any morning briefing thereafter. Had the event been significant, the appellants submit, it would have been mentioned. LCdr. McCallum's evidence was that each morning briefing was a compilation of information from a number of

classified networks. He also testified that within "a couple of hours" military investigators were able to ascertain that it was the access application, and not PDSM itself, that had been tampered with. His evidence was that "there was no operational impact" caused by the removal of the icon.

[25] However, LCdr. McCallum also testified that the initial concern that the PDSM had been tampered with caused "considerable angst" at NDCC, and that when military officials became aware that an incident had occurred in respect of its operations, military police were contacted immediately to investigate.

[26] LCol. Heuthorst was the Commander of NDCC at the time of the sentencing hearing. He arrived at NDCC in late July 2007. The appellants point out that he was not at NDCC at the time of the offence or immediately afterwards, and so his evidence as to the effect of the offence on NDCC operations should be given little weight. However, as Commander of the NDCC, LCol. Heuthorst provided evidence concerning the nature of the functions which Information Management NCM's such as Reid and Sinclair provided, and their role in NDCC. LCol. Heuthorst also gave evidence as to how the offence affected how he carried out his job as NDCC Commander once he began his assignment as NDCC Commander. LCol. Heuthorst testified that he had to work very hard to "restore confidence that the people who receive our information have in what we give them; that we know what we give them is accurate, timely, and true." The military judge was entitled to use this testimony to make findings of fact regarding the long-term impact of the appellants' actions.

[27] I disagree with the appellants that the military judge made an error in finding that significant harm flowed from their actions. The military judge's finding that there was an internal crisis at NDCC following the discovery of the appellants' actions is supported by LCol. Heuthorst's evidence, and is not contradicted by LCdr. McCallum's evidence that there was no operational impact. LCol. Heuthorst described an increased sense of vulnerability at NDCC following the events. He said "the fact that members of the staff of the watch manipulated the systems, calls into question and into doubt the accuracy, timeliness and trustworthiness of the information, all of the information, that NDCC puts out to the strategic and political levels of the Canadian Forces and DND." He also testified that the "defendants' actions brought into doubt the timeliness and the accuracy of the information that NDCC provides to our allies, to the senior levels of the Canadian Forces and the Department of National Defence". The fact that he acknowledged that there was "no long term impact...on operations" does not change the fact that the impact of this incident was to undermine confidence in NDCC's ability to carry out its mission.

[28] In summary, the military judge had evidence before him on which to conclude that there was an "internal crisis" at NDCC following the incident.

(3) Overemphasizing the risks of their actions as an aggravating factor

[29] The appellants submit that the military judge erred in treating the mere possibility of risk that prompted the state of crisis as an aggravating factor. In support of this proposition, counsel for LS Reid cites *Ruby on Sentencing* (7th ed, 2008), in which the author says "[i]t is significant

mitigation if the crime causes little or no harm"(5.14). If this is so, the appellant submits, then it cannot be that unrealized harm is an aggravating factor.

[30] The appellants raise an interesting question relating to proportionality and the unrealized risks of an offence. However, it is not necessary to decide this issue. As set out above, I do not accept that the harm caused was purely theoretical, or that it was minimal. The actions of LS Reid and LS Sinclair caused a crisis of confidence at NDCC. Their ill-advised conduct revealed to NDCC just how vulnerable its vital information management systems were to human interference. It is crucial that NDCC and those it serves have confidence in the accuracy and timeliness of the information it provides. It was not an error to consider this an aggravating factor.

[31] The appellants further submit that the military judge erred by overemphasizing this one aggravating factor. The assessment by a court of appeal of a trial judge's weighing of relevant factors on sentencing is done on a reasonableness basis. The Ontario Court of Appeal's reasons in *R. v. McKnight* (1999), 135 C.C.C. (3d) 41, at para. 35 are apposite:

> ... overemphasizing a relevant factor or failing to give enough weight to a relevant factor may amount to an error in principle...This does not mean, however, that an appellate court is justified in interfering with the trial judge's exercise of discretion merely because it would have given different weight or emphasis to a factor relevant to the sentence...Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground that the trial judge erred in principle.

[32] The military judge did not unreasonably emphasize this one factor over other aggravating or mitigating factors. He considered other aggravating factors, including the breach of trust implicit in the appellants' actions, and he also considered the mitigating factors (with the exception of the appellants' family and financial status, which was an error). There was no unreasonable emphasis on the harm caused or the harm risked.

(4) Failing to consider the minimal impact of the offence as a mitigating factor

[33] It follows that I do not accept the submission of the appellants that the lack of actual harm should have been considered a mitigating factor. It is my view that the judge did properly consider the submissions of the appellants that their act caused "minimal harm" and rejected it. He was entitled to do so.

(5) Failing to reduce the sentence in recognition of the punishment already suffered by way of media attention

[34] The appellant submits that some reduction in sentence is warranted by virtue of state conduct in the prosecution of this appeal. In their factums, the appellants emphasize the public shame they suffered when it was reported to the media by the CFNIS that they were being charged with sabotage and conspiracy. The fact that the charges were later reduced to damaging Her Majesty's Property did not relieve the shame and anxiety that LS Reid and LS Sinclair experienced. I would not accede to this ground. To do so would be to interfere with prosecutorial discretion. At the time the offence became known, it may well be that it appeared to the charging authority that this was a case of sabotage. The prosecutor was entitled to charge as she saw fit,

and was also entitled to reduce the charges later, when on further investigation it appeared that the charges of sabotage were not supported by the evidence. In the absence of evidence of an abuse of process, the discretion of the prosecutor will not be interfered with. The mere fact of a change in the charge and alerting the media to the charges does not amount to an abuse of process.

[35] The media coverage and negative publicity received by an offender are properly considered mitigating circumstances: see *R. v. Ewanchuk*, 2002 ABCA 95, para. 65. The military judge took this into account. It is not this Court's task to re-weigh this factor on appeal, and I am not convinced that he committed any error in this regard.

(6) Failing to effect a reduction in sentence in recognition of the conduct of military officials in the course of the investigation

[36] The appellants also point to the conduct of the NIS in seizing and retaining their electronic devices, including their cellular phones, for a period exceeding that allowed by ss. 490(3) of the Criminal Code. This caused the appellants to replace these items at considerable expense to themselves. The appellants have not alleged a *Charter* breach, but also submit that one is not required in order to justify a reduction of sentence. Counsel for LS Sinclair points to the Supreme Court of Canada's recent decision in *R. v. Nasogaluak*, 2010 SCC 6, where at para. 55 of the reasons, Lebel J., writing for the Court, said:

> a sentencing judge may take into account police violence or other state misconduct while crafting a fit and proportionate sentence, without requiring the offender to prove that the incidents complained of amount to a *Charter* breach.

[37] However, in *Nasogaluak*, the Court emphasized that it was only state conduct that went to the circumstances of the offence or the offender, in the manner contemplated by the sentencing provisions of the Criminal Code, which would warrant a reduction in sentence. The state behavior described by the appellants does not rise to the level of conduct contemplated in *Nasogaluak*, nor am I convinced that it goes to the circumstances of the offence or the offender. Accordingly, a reduction in sentence is not appropriate in this case.

(7) Fitness of Sentence

[38] I am not convinced that the appellants have demonstrated that the sentence imposed is disproportionate or unfit. Despite the error in failing to consider the appellants' financial and family situation as a mitigating factor, there are a number of factors properly recognized by the military judge that ultimately support the sentence imposed. No serious damage was caused to the database itself and the loss of efficiency and timeliness did not result in any national security threats, but the positions of the offenders at the time, the context of sensitive computer intelligence, the premeditation, and the breach of trust involved all indicate that the sentence is an appropriate one. There is no question that the reduction in rank has and will have a significant financial impact on both appellants. There are both salary reduction and potentially pension reductions as a result.

[39] All of the above indicates the sentences are fit and proportional. In fact, LS Reid and LS Sinclair are fortunate to still have a place in the Canadian Forces. The financial consequences of their reduction in rank are significant, but while the financial hardship is not to be discounted, it

must be remembered that it is a necessary consequence of a reduction in rank. 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. That loss of trust is expressed in this case through demotion to a position in which the offenders have lost their supervisory capacity. A demotion was a necessary component of a fit sentence in this case. I would not interfere with the military judge's sentence for this reason.

Disposition

[40] The appellants have not persuaded me that the military judge's sentence was demonstrably unfit. I would grant leave, but would dismiss the appeals.

E. Bennett
J.A.

"I agree
K. Sharlow J.A."

"I agree
Johanne Trudel J.A."

COURT MARTIAL APEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-524
STYLE OF CAUSE:	Leading Seaman Sylvia Reid v. Her Majesty the Queen
PLACE OF HEARING:	Vancouver, British Columbia
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CONCURRED IN BY:	Sharlow J.A. Trudel J.A.
DATED:	April 20, 2010

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COURT MARTIAL APEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-526
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