**Date: 20030926**

**Docket: CMAC-469**

**Citation: 2003 CMAC 9**

**CORAM:** **LINDEN J.A.**
**HUDDART J.A.**
**SNIDER J.A.**

**BETWEEN:**

**CORPORAL THOMAS JOHN FORSYTH**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**REASONS FOR JUDGMENT OF THE COURT**
(Delivered orally from the Bench at Toronto, Ontario
on Friday, September 26, 2003.)

**THE COURT**

[1] This is an appeal from a decision of a Standing Court Martial which convicted the appellant of assault causing bodily harm on September 5, 2002 and sentenced him to 8 months

imprisonment. This appeal challenges the validity of that conviction on jurisdictional grounds and, in the alternative, seeks to alter the sentence imposed by the Court.

[2] The facts in brief are that an assault took place on July 1, 1999 at Oromocto, New Brunswick, when Corporal Forsyth, then a private, severely assaulted his live-in common law wife, Kerri Kephart, in military housing on military property. The facts found by the Military Judge was that he hit her on the head and her stomach, dragged her by her hair on the kitchen hallway floor, punched her in her left eye, threw her on the table and tried to choke her. The assault lasted 45 minutes and left the victim with a cut on her left ankle, a swollen eye that was red, bruises on her neck and patches of hair missing from her head. The pain lasted 3 to 4 weeks.

[3] The RCMP, which investigated the incident, charged Corporal Forsyth with the summary offence of common assault. While the Military authorities were aware of the charge, they did not seek to lay a charge in the military system at that time. On August 23, 1999, Corporal Forsyth, who retained counsel, entered a plea of not guilty and a trial date was set for November 24, 1999.

[4] After the assault, Ms. Kephart moved back to Alberta with the knowledge of the RCMP, which later offered to pay her expenses to testify at the trial in New Brunswick. She declined. The RCMP agreed not to issue a subpoena.

[5] On November 24, 1999, the trial was about the begin in Provincial Court, but without Ms. Kephart. Since it was "impossible" for the Crown to prove its case without her, according to the Crown Prosecutor, Mr. B. MacDonald, he sought to withdraw the charges upon motion to the Court. The Court allowed the withdrawal.

[6] Prior to the withdrawal, the Military authorities had discussions with the RCMP, indicating that they might proceed with charges, but this was not communicated to Corporal Forsyth or to his counsel.

[7] It was admitted by counsel for the Crown that he withdrew the charge rather than allowing it to be dismissed, in order to avoid the possibility of a defence of *autrefois acquit* in the event that the Military chose to proceed with a charge at a later date.

[8] On January 24, 2000, two months later, the military authorities charged Corporal Forsyth with the indictable offence of assault causing bodily harm.

[9] On November 28, 2000 there was an application in the Military Court to dismiss the charge on jurisdictional grounds, which was denied on November 30, 2000. The defence then applied to the Federal Court of Canada for a writ of prohibition but this was denied.

[10] Consequently, Corporal Forsyth was tried by the Standing Court Martial on September 4 and 5, 2000, was convicted as charged of assault causing bodily harm, and was sentenced to 8 months imprisonment by the Military Judge, who then allowed the release of Corporal Forsyth pending this appeal.

[11] The issues in this case are whether the Standing Court Martial had jurisdiction to conduct the trial in these circumstances and, if so, whether the sentence was fit.

[12] The first jurisdictional argument was that the Military Court lost jurisdiction when it allowed the RCMP and a civilian Court to deal with the matter. This argument, which was not pressed by counsel, is without merit, as it is agreed by all that the jurisdiction in these cases is concurrent; that is, either authority may conduct the proceedings in a case such as this. (See *Peter W. Hogg, Constitutional Law of Canada*, 2nd ed. 1985 at 433)

[13] The next jurisdictional argument is that of *autrefois acquit* and double jeopardy. It is, of course, clear that a person charged with an offence and acquitted or convicted of that offence cannot be tried again for an offence based on the same facts. The *National Defence Act* clearly adopts this principle in s.66(1) of the *National Defence Act* R.S.C. 1985, c. N–5 s.130. This may well be enough to dispose of the matter, but, as discussed below, the Common Law is in harmony with this.

[14] The appellant argues relying on the Common Law doctrine, that, once the accused is "placed in jeopardy", even though there is no acquittal or conviction, the principle applies. Thus, it is contended that, once there is a plea, the accused is placed "in jeopardy" and, hence, after that point, the principle of *autrefois acquit* comes into play. (See *R.* v. *Petersen* (1982), 69 C.C.C. (2d) 385 (S.C.C.)) While this may be the case in certain circumstances, in our view, it is not the case where the charge is subsequently withdrawn, (see *Dickson C.J.C.* in *R.* v. *Selhi* 53 C.C.C. (3d) 576 (S.C.C.)) as long as there is no bad faith in doing so. (See *R.* v. *Pan* [2001] 2 S.C.R. 344, per Arbour J.)

[15] Where there is no adjudication of the case on the merits - that is, no dismissal, no acquittal and no conviction - the principle does not apply. The prosecutor has the authority to seek a withdrawal of a charge and, if the Court allows it, there is no adjudication of the charge, subject to the situation in *R.* v. *Pan supra*. In these circumstances the defence of *autrefois acquit* is unavailable. There is, we are told, no authority directly on this point but that has been the general understanding of the criminal bar over the years. *(R.* v. *Karpinski* (1957), R.C.S. 343; see also *Bonli* v. *Gosselin Prov. J.* and the *A.G. Saskatchewan* (1981), 25 C.R. (3d) 303 (Sask. C.A.) at p. 306-307)

[16] The reasons of Justice MacIntyre in *R.* v. *Petersen*, [1982] 2 S.C.R. 493 make clear that not only must the accused be placed in jeopardy, but there must normally be a determination: that is, an acquittal or a dismissal. He wrote:

> "The authorities he relied upon in his reasons support the position that once a plea is entered before a court of competent jurisdiction the accused is in jeopardy. Where that court proceeds to a determination, in the nature of an

> acquittal or dismissal, proceedings on new Information raising the same allegation will be barred."

[17] The plea of *autrefois acquit*, therefore, fails.

[18] The main thrust of this appeal, according to counsel for the appellant, is whether the Crown's silence as to its reasons for seeking the Court's approval to withdraw the charge of common assault constituted an abuse of the Court's process that can be remedied only by a judicial stay of the prosecution. In the appellant's view, the Crown had a duty to disclose the existence of an agreement not to subpoena the victim and its knowledge that the Director of Military Prosecutions might prefer a charge before a Standing Court Martial under the *National Defence Act* if the assault charge were withdrawn.

[19] Had that information been before the Provincial Court, that Court would, the submission continues, more likely than not, have dismissed the assault charge, thereby permitting a plea of *autrefois acquit* to succeed later before the Standing Court Martial. Thus, the prejudice to the appellant is said to be the loss of an opportunity to seek a dismissal at the time the withdrawal application was made.

[20] The difficulty with this submission is that the opportunity to object to the withdrawal and to request that the case proceed to a verdict was available to the appellant before the Provincial Court Judge. He did not avail himself of the opportunity, although he was aware the complainant was not available to testify. In the absence of any evidence, one can only speculate about why the

opportunity was not taken. Nor is it clear on the evidence what might have been the result had the Crown made the suggested disclosure and the appellant objected to the withdrawal and sought a dismissal of the assault charge. In the circumstances of the case, where police officers intervened to stop the assault after being called by a neighbour, the absence of the complainant was not fatal to a conviction, although Crown counsel advised the Court he could not proceed because of her absence.

[21] While it would have been better had the experienced Crown counsel advised the Court of his reasons for seeking a withdrawal of the charges, we cannot see in his failure to do so such unfairness as would undermine the integrity of the judicial process. Only such unfairness demands a remedy, as L'Heureux-Dubé explained in *R.* v. *Power*, [1994] 1 S.C.R. 601 at para. 11 and 12.

[22] It cannot be an abuse of process to request the withdrawal of an information. That is the right of the Crown, before or after plea. The possibility of a new charge being laid is implicit in a decision to withdraw a charge. Indeed, the preservation of that right is often a purpose of such a request. The legal consequence of a withdrawal of a criminal charge is the preservation of the Crown's ability to lay a new charge should it be so advised, until the expiration of any applicable limitation period (see *R*. v *Karpinski supra* paragraph 15).

[23] The evidence in this case falls far short of overwhelming evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community required to

constitute an abuse of process. At most, it establishes a failure to educate defence counsel as to the legal consequences that will flow from a prosecution exercise of the Crown's right to withdraw a charge after plea with the Court's consent, something the defence counsel should know without being told.

[24] The appellant also seeks leave to appeal the severity of the sentence. The Military Judge sentenced the appellant to eight months imprisonment for the assault on Ms. Kephart. In making this determination, he considered principles of sentencing, including the protection of the public, the punishment of the offender, general and specific deterrence, the reformation and rehabilitation of the offender and the proportionality principle. Given the nature of the offence, the circumstances of its commission and the character, rank and status of the offender, the Military Judge concluded that the protection of the public and the maintenance of discipline would best be met by the imposition of a sentence which would reflect general and individual deterrence.

[25] He specifically considered the following mitigating factors:

- Corporal Forsyth took measures to overcome his drinking problem;
- Corporal Forsyth's rank and equity in the Canadian Forces and his work performance;
- the consequences on Corporal Forsyth's military career.

[26] He also stated that he considered the following aggravating factors:

- the nature of the offence and punishment;

- the victim, Ms. Kephart, was Corporal Forsyth's common-law spouse;
- Corporal Forsyth's lack of remorse;
- the degree of violence used and the length of the assault;
- the fact that the assault took place in a military environment;
- the psychological impact of the assault on the victim;
- the physical and financial consequences on the victim;
- the conduct sheet of Corporal Forsyth - namely 2 prior assault convictions, 1 conviction for operating a motor vehicle having consumed alcohol, 1 absence without leave;
- the circumstances surrounding the offence;
- the consequences of the offence and the victim's injuries;
- the character of and impact on the victim.

[27] The parties agreed on the standard of review to be applied in the case of sentencing. Briefly stated, this Court cannot vary the sentence unless the Military Judge erred in principle or erred by imposing a demonstrably unfit sentence ( *R.* v. *Shropshire*, [1995] 4 S.C.R. 227). As stated by Chief Justice Lamer C.J., writing for the Supreme Court of Canada in *R.* v. *M. (C.A.)*, [1996] 1 S.C.R. 500;

> 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. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code. [...]

While the setting here is that of a military court, there is no reason that the same principles should not apply, subject, of course, to any express provisions in the *National Defence Act*.

[28] Both counsel agree and we also are in accord that there was an error in principle when the Military Judge considered "lack of remorse" as a factor in his sentencing decision. We, therefore, grant leave to appeal the sentence.

[29] The question before the Court, however, is whether this error is sufficient to vary the decision of the Military Judge. We note that "lack of remorse" is merely included in a long list of aggravating factors. While other of the factors were discussed and explained in his reasons, this particular factor received no further explanation or comment. In particular, the Military Judge refers explicitly to the fact that the assault of his common-law spouse took place in the "safe haven of one's home that has been turned into a virtual chamber of torture for its victim". He also stressed the nature of the assault and the extent of the injuries suffered by Ms. Kephart as a result of that assault.

[30] Another matter of importance to the Military Judge was his concern that the appellant had still not taken steps to address the problems in his own behaviour. After balancing the mitigating factors against the aggravating factors and concluding that the aggravating factors were much more present in this case, he stated as follows:

> I also do not find many steps taken by the offender to amend his behaviour, he had attended an interventive education workshop after his arrest for drinking and driving, but the objectives of this workshop ... do not include anger

> management. In fact the offender does not admit his propensity of violence. He always offers and excuse for a past behaviour involving violence.

These appear to have been the matters to which the Military Judge actually gave weight. We are not persuaded that including, in error, "lack of remorse" on the list of factors he considered had a material impact on the sentence imposed by the Military Judge. In any event, as discussed below, we would likely have reached a similar conclusion based on the same analysis as was carried out by the Military Judge.

[31] The appellant submits that the Military Judge also erred by considering the military environment in which the assault occurred as an aggravating factor *( R.* v. *St. Jean,* [2000] C.M.A.J. No. 2 (C.M.A.C.) (QL). The fact that an offence punishable by ordinary law was committed by a member of the military in civilian-like circumstances does not necessarily mean that this offence poses a challenge to military discipline and requires more severe punishment than would be the case if a civilian engaged in such conduct (*St. Jean, supra*).

[32] However, there is no indication that Corporal Forsyth was more severely punished than a civilian charged with the same offence would be. The cases cited by the parties during the sentencing submissions and to us all occurred in the civilian context. Although the Military Judge listed the military environment as an aggravating actor, he did not analyse this factor in detail or state that Corporal Forsyth should be punished more severely than a civilian found guilty of the same conduct. Accordingly, we find no error.

[33] The appellant submits that incarceration is not always necessary for general deterrence and denunciation ( *R.* v. *Gladue,* [] 1 S.C.R. 688; *St. Jean, supra*), and that the Military Judge ought to have considered alternatives to incarceration (*National Defence Act*, s.139(1), 175) in the circumstances of this case. This was impliedly done. In our view, despite the error of including lack of remorse in his list of aggravating factors, the Military Judge reached the correct result that "a sentence of imprisonment is necessary in the circumstances of this case to make you realize that the time has come to amend your behaviour". A balancing of mitigating and aggravating factors, leaving out the factor of the lack of remorse, leads to the conclusion that incarceration is a fit and reasonable result. While we agree that incarceration is not always necessary for deterrence, the particular circumstances of this case, as so well described by the Military Judge, are a strong argument for imprisonment of the appellant.

[34] The appellant also argues that the sentence of eight months' imprisonment is unfit and clearly unreasonable. In support of this submission, the appellant draws analogies to a number of cases, including *R.* v. *Highway* (1992), 125 A.R. 150 (Alta. C.A.), *R.* v. *Inwood* (1989), 48 C.C.C. (3d) 173 (Ont. C.A.), *R.* v. *O'Keefe*, (1997) 158 Nfld. & P.E.I.R. 138 (Nfld. Prov. Ct.) and *R.* v. *Hunter*, [1998] A.J. No. 510 (C.A.). In our view, the length of sentence for this serious assault on the appellant's common law spouse is fit. The assault of Ms. Kephart that took place in the family home only ceased upon the arrival of the R.C.M.P. after a 9-1-1 call from a neighbour. The injuries sustained by Ms. Kephart were more than transitory. She had broken blood vessels in her eye, three bald patches on the back of her head, a black eye, bruises around her face, jaw and temple, severe bruising around her neck with fingerprint indentations and cut

left ankle. According to Ms. Kephart, it took two months for her hair to start growing back and between two to four weeks for the bruising to clear. The sentences in the other spousal abuse cases presented to us ranged from 3 months to 18 months. A sentence of 8 months is within the range of those cases and is, in our view, a fit sentence.

[35] This appeal will be dismissed on jurisdictional grounds. Leave to appeal the sentence will be allowed but the appeal on sentence will be dismissed.

"A. M. Linden"
J.A.

"Carol Huddart"
J.A.

"Judith A. Snider"
J.A.