Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20091218

Docket: CMAC-515

Citation: 2009 CMAC 8

CORAM: **WEILER J.A.**
GAUTHIER J.A.
ZINN J.A.

BETWEEN:

SGT THOMPSON, E.R.,

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on October 30, 2009.

Judgment delivered at Ottawa, Ontario, on December 18, 2009.

REASONS FOR JUDGMENT BY: WEILER J.A.

CONCURRED IN BY: GAUTHIER J.A.
ZINN J.A.

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REASONS FOR JUDGMENT

WEILER J.A.

OVERVIEW

[1] After a 21 year unblemished record, the appellant, a former Sergeant in the Canadian Armed Forces and course instructor, was charged with two counts of "Conduct to the Prejudice of Good Order and Discipline", contrary to s. 129 of the *National Defence Act*, R.S.C. 1985, c. N-5 (NDA). At his trial before the Military judge, also referred to as the Disciplinary Court Martial Judge, the appellant pled guilty and admitted

he engaged in consensual sexual relations with a female private. Although the appellant was not instructing the private, their relationship was contrary to the *Land Forces Western Area Training Centre* (LFWATC*) Relationship Policy*. He was further charged with one count for having failed to report his inappropriate relationship with the Private. However, this charge was dismissed following a pre-trial motion of the appellant. In addition, the appellant was charged with one count of abusing his authority by threatening and intimidating two Privates, Private Y and Private P, contrary to *Defence Administration Order and Directive 50120, Harassment Prevention and Resolution Policy*. He pled not guilty to these charges. The Military Judge found that the appellant did indeed tell two other course candidates to put a stop to rumours regarding the relationship between himself and the female private. Due to the difference in rank and relationship of instructor to student, the Military Judge found him guilty. The global sentence imposed for the offences of which the appellant was found guilty was a reduction in rank from Sergeant to Corporal.

ISSUES

[2] The appellant appeals the findings of guilt against him and the sentence imposed on the following grounds:

> (1) The Military judge erred in failing to decline jurisdiction to proceed with the hearing.

> (2) The Military judge erred in dismissing the appellant's application for a stay of proceedings as an abuse of process.
>
> (3) The sentence imposed is unduly harsh and manifestly excessive.

[3] For the reasons that follow, I would dismiss the first ground of appeal, allow the second, in part, and allow the appeal as to sentence, substituting in its place a strong reprimand and a fine of $2500.

FACTS

[4] The facts are not in issue. The appellant was employed as 1 Section Commander on Canadian Forces Base (CFB) Wainwright, Denwood Alberta *LFWATC* in instructing course candidates. Private Y, the woman with whom the appellant had a consensual sexual relationship, was a candidate in a section of the Basic Military Qualification course not taught by the appellant.

[5] On or about December 14, 2006, Private Y approached Sergeant Thomson and expressed an interest in contacting him during the Christmas break. Sergeant Thomson rebuffed Private Y, stating that that would be inappropriate. On the night of December 21, the eve before the Christmas break, she again approached Sergeant Thomson[1] wanting to discuss a personal matter. They met and had sexual intercourse in the Unit lines.

[1]The second attempt at contact by Private Y is not in the agreed statement of facts but is taken from Sergeant Thomson's letter seeking review of the summary judge's sentence.

[6] Sergeant Thomson and Private Y stayed in contact by telephone over the Christmas break and spent the final weekend of the holiday together. The relationship continued following the resumption of the course in January 2007 with the couple spending a number of weekends together.

[7] On Sunday, February 4, 2007, Course Warrant Officer (CWO) Doucet was informed by other candidates that Private Y was absent without leave (AWOL) and had been so since the previous Friday evening. He initiated a Unit investigation. When Private Y returned to the Unit lines after being AWOL, she was interviewed by CWO Doucet and she submitted a written statement admitting the details of her relationship with the appellant.

[8] On February 6, 2007, the appellant was called to the Regional Sergeant Major's (RSM) office and informed he was under investigation for service offences relating to Private Y. On February 6, the appellant provided a statement to Cpl. Book, a Military Police officer.[2]

[9] The appellant was advised that he was to have no contact (including via telephone) with Private Y. He was told that if he had any questions, he was to contact Master Warrant Officer (MWO) Macdonald or MWO Bolen.

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[2] In his letter requesting review of the summary judge's sentence, Sergeant Thomson states: The summary investigation and subsequent charges resulted from our honesty when providing our statements to the Military Police. This willingness and honesty was acknowledged by Cpl. Book in his testimony. The appellant's statement to Book is not in the Appeal Book.

[10] After the meeting, the appellant asked MWO Macdonald whether he could attend the graduation parade of his candidates as a spectator. MWO Macdonald said he would get back to him.

[11] The next day, the appellant checked for messages from MWO Macdonald and having been informed there were none, he arrived at the graduation parade early, at 9:25 a.m., so as to avoid contact with Private Y who would be arriving at 9:30 a.m. Almost immediately Warrant Officer (WO) MacNeil came over and told him that MWO Bolen had seen him and directed he leave. He did so. The appellant was subsequently charged with disobeying a lawful command of a superior officer.

[12] Afterwards, WO Davis told the appellant that the RSM had tried to contact him that morning and had left a message informing him that he was not to attend the graduation parade. WO Davis stated he did not think to call the appellant's cell phone, send an email or leave a note on his desk, as he thought the parade was at 10:30 a.m.

[13] The appellant elected summary trial before his Commanding Officer (CO), M.M. Minor. He was found guilty of both charges on February 15, 2007 and sentenced to a reduction in rank from Sergeant to Corporal. The sentence was immediately put into effect.

[14] On February 28, 2007 the appellant submitted a written request for a review of his summary trial results. In relation to the charge, disobeying the lawful command of a

superior officer, the appellant contested the finding of guilt on the basis that he did not intend to disobey a superior officer. In relation to the charge, conduct contrary to good order and discipline, the appellant stated he did not contest the finding of guilt but submitted that the sentence of rank reduction was too severe, even if both charges were to stand.

[15] In that respect, the appellant raised three principal concerns in relation to the decision of his Commanding Officer about which I will elaborate further. The first is that he was not given the opportunity to admit the particulars of the charges. An accused person who elects summary trial cannot plead guilty. He or she can admit none, some or all of the particulars of the charges. Thus, like a plea of guilt, an admission of the particulars is generally considered to be a mitigating factor in sentencing. Instead of extending this right to the appellant, CO Minor immediately called the first witness after reading the statement of the offence. Thus, the appellant was denied the opportunity to put forward a mitigating factor as to sentence.

[16] Second, the appellant alleged that he was not given the opportunity to address his extenuating circumstances regarding sentence. From the appellant's perspective, the appellant's relationship with his family had deteriorated, partly as a result of having done back-to-back tours in the field and having then been posted to Wainwright, Alberta. In July 2006, his wife decided to move with his two youngest children to Northern Ontario. Once he completed the course he was instructing, and associated administrative tasks, he

was not scheduled to instruct again until September. He asked to be relocated to Ontario with a view to spending time with his family, but his request was denied. He was told that the training centre could not afford to task him away from the school and that he would begin instructing again immediately. As the course he was instructing did not break until December 23, the appellant was further burdened with his Christmas leave period being shortened. In the interim, his wife had served him with divorce papers. This was the first Christmas he had spent alone without his children or other family. The culmination of these events left the appellant in a fragile mental state and may have made him vulnerable to performing actions otherwise out of character.

[17] The reduction in rank had a significant financial impact on the appellant, reducing his pay by $575 a month, resulting in $6,900 less annually. The appellant`s son had recently been diagnosed with a brain tumour. His former spouse was required to take time off work in order to travel with their son to see specialists and to receive treatment. These expenses fell under Schedule 7 of the Federal Child Support Amount Tables and the appellant had agreed to pay 80% of these expenses. His reduction in pay affected the amount of financial support he could contribute to his son.

[18] CO Minor replied to the appellant's written request for a review of his summary trial, stating in part:

> Cpl. Thompson was given an opportunity to speak following the sentencing. A witness first spoke to his character and

> professionalism. I then asked Cpl. Thompson if he had any comments he would like to make regarding the sentencing. It was made perfectly clear to him earlier in the trial that he would have an opportunity to speak to the mitigating factors if he was found guilty. After sentencing**,** Cpl. Thompson did make representation speaking to his good work as an instructor in Wainwright. That he chose not to address his extenuating circumstances is his own fault.

[19] Turning now to the third argument, under the heading "Altering the Sentence" in his letter, the appellant stated:

> In accordance with QR&O 104.10(4), when passing his sentence, the Presiding Officer indicated a reduction in rank to Master Corporal. After intervention by Orderly Room staff, it was later clarified by him that in fact he had erred, the Master Corporal rank is an appointment and thus the reduction would be instead to Corporal. I believe that this shows the Presiding Officer did not initially wish to punish me as severely as he did, however, because of his mistake he may have felt obligated to carry through with a reduction in rank even though it exceeded his initial intent.

[20] CO Minor replied:

> Based on the nature and degree of Corporal Thompson's infraction, I determined to reduce him by one substantive rank. I admit that I originally stated that he would be reduced to the rank of Master Corporal but the problem was identified within minutes of the conclusion of the trial and corrected.
>
> I considered my decision after the trial was completed and based on the nature of Cpl. Thompson's offence I do not believe the reduction in rank to Corporal is excessive in light of the need to maintain discipline and trust within this unit.

[21] On April 17, 2007, not having received any decision within the stipulated 21 days of receiving the request for review, and 48 days since his request was submitted, the appellant brought a Grievance Of Delay in Review.

[22] On May 16, 2007 M.S. Skidmore, Brigadier-General Commander, stated:

> I am of the view the appropriate remedy in the circumstances is the quashing of findings of guilty on both charges. As a result, the entire sentence, namely, reduction in rank, is set aside. In making this determination I am mindful of Cpl Thompson's submissions which were primarily focused on Charge #2. Despite the foregoing, however, I note a number of Cpl Thompson's concerns related to procedural matters which affect the entire trial, including any findings made by the Presiding Officer in connection with Charge #1.
>
> As provided by Ref. C. all concerned are reminded that a new trial may be held in connection with the facts which gave rise to both charges tried by the Presiding Officer herein.

[23] On May 22, 2007, having served his sentence for 97 days, the appellant was reinstated to his rank of Sergeant. On July 10, 2007, the appellant was charged a second time on count 1 of the original record of disciplinary proceeding. The charge of disobedience to the order of a superior officer was not relaid. The appellant elected trial before a Court Martial on August 14, 2007.

[24] On November 22, 2007, the Director of Military Prosecutions (DMP) signed a charge sheet that contained a new charge against the appellant which he preferred on December 4, 2007. The particulars of the charge are as follows:

> In that he, on or about 8 January, 2007, at Canadian Forces Base Wainwright Denwood Alberta, abused his authority by threatening and intimidating Private Y and Private P, contrary to *Defence Administrative Order and Directive 5012, Harassment Prevention and Resolution*.

[25] At the outset of the Court Martial on May 7, 2008, the appellant pled guilty to the conduct charge respecting his relationship with Private Y. His counsel applied to the court to dismiss the charge relating to abuse of authority on the ground it constituted an abuse of process. It appears that the evidence relating to this charge was in the possession of the DMP at the time the original conduct charge was preferred, yet the abuse of authority charge was only preferred 147 days after he was re-charged with the offence relating to his inappropriate relationship and 112 days after he had elected trial by Court Martial. No explanation was given for this delay.

[26] The Military judge dismissed the appellant's application. As I have indicated, the appellant pled guilty to the conduct charge and, after a trial, the Military judge found him guilty of the abuse of authority charge. I now turn to the appellant's grounds of appeal.

ANALYSIS OF ISSUES

(1) Did the Military judge err in failing to decline jurisdiction to proceed with the hearing?

[27] The appellant submits that the Military Judge erred in failing to decline jurisdiction to proceed with the hearing because the appellant had already been tried and sentenced summarily on the conduct charge of conduct contrary to good order and discipline. To be tried again when he had only requested a review of his sentence, violated his right to protection against double jeopardy contained in s. 11(*h*) of the *Canadian Charter of Rights and Freedoms*. The ordering of a new trial, as a result of the

appellant exercising his right to have his sentence reviewed, exposed the appellant to a potentially greater jeopardy. The charge of abuse of authority was laid as a direct consequence of the quashing of the conduct contrary to good order charge by the review authority.

[28] The appellant did not raise the jurisdictional issue at his trial before the Military judge. The respondent submits that, in these circumstances, the appellant is not entitled to raise this issue now, for the first time, on appeal, as he effectively waived his right to challenge the jurisdiction of the Court by his voluntary and informed plea of guilt to the conduct charge. The respondent relies on *R. v. Perka*, [1984] 2 S.C.R. 232 and *Goodwin v. R.*, [1988] C.M.A.J. No. 2 in support of its submission. The maxim set out in *Giroux v. The King* [1917] 56 S.C.R. 63, at p. 67, consent cannot confer jurisdiction,[3] is applicable to the present case and, as such, I prefer to deal with the submission on its merits.

[29] There is no appeal from the decision of the summary trial judge *Queen's Regulation and Orders for the Canadian Forces*, c. 108 (QR&O) s. 108.45. The following provisions of the NDA provide for a review:

> 249.
>
> Chief of the Defence Staff and other military authorities

[3] See also *R. v. Cooper* (1968), 1 O.R. 71-80; *R. v. Selock* (1931), 56 C.C.C. 243 (Alta. C.A.) at p. 245 and *R. v. Holmes*, 40 O.R. (2d) 707 at para. 21 and, more recently, in *R. v. Leduc* (2003), 66 O.R. (3d) 1 (C.A.) at para. 59 and *British Columbia (A.G.) v. Lafarge Canada Inc.*, 2007 S.C.C. 23.

> (3) The review authorities in respect of findings of guilty made and punishments imposed by persons presiding at summary trials are the Chief of the Defence Staff and such other military authorities as are prescribed by the Governor in Council in regulations.
>
> When authorities may act
>
> (4) *A review authority in respect of any finding of guilty made and any punishment imposed by a person presiding at a summary trial may act on its own initiative or on application of the person found guilty made in accordance with regulations made by the Governor in Council.* [Emphasis added.]
>
> R.S., 1985, c. N-5, s. 249; 1998, c. 35, s. 82.
>
> 249.11 (1) Any finding of guilty made by a service tribunal may be quashed by a review authority.
>
> Effect of complete quashing
>
> (2) Where no other finding of guilty remains after a finding of guilty has been quashed under subsection (1), the whole of the sentence ceases to have force and effect and the person who had been found guilty may be tried as if no previous trial had been held.
>
> Effect of partial quashing
>
> (3) Where another finding of guilty remains after a finding of guilty has been quashed under subsection (1) and any punishment included in the sentence is in excess of the punishment authorized in respect of any remaining finding of guilty or is, in the opinion of the review authority that made the decision to quash, unduly severe, the review authority shall substitute for that punishment any new punishment or punishments that it considers appropriate. 1998, c. 35, s. 82.

[30] Section 249(4) provides two circumstances when a review authority may act: on its own initiative or on the application of the person found guilty. Although Brigadier-

General Commander Skidmore, the review authority here, went beyond the appellant's request to review only his sentence in relation to the first count, the NDA enables him to act on his own initiative and he exercised his prerogative to do so. In his letter to the appellant dated May 16, 2007, Brigadier-General Commander Skidmore stated that "a number of Cpl. Thomson's concerns related to procedural matters which affect the entire trial, including any findings made by the Presiding Officer in connection with Charge #1."

[31] The statute makes clear that the appellant was not placed in double jeopardy. Section 249.11(2), which is not challenged, specifically provides that where the finding of guilt is quashed, the person who has been found guilty may be tried as if no trial had been held. Accordingly, I would dismiss this ground of appeal.

(2) Did the Military judge err in dismissing the appellant's application for a stay of proceedings as an abuse of process?

[32] Courts have a residual discretion to stay proceedings in the clearest of cases. That discretion is to be exercised when the proceedings would violate the fundamental principles of justice that underlie the community's sense of fair play and decency, or where the proceedings would be oppressive or vexatious: see *R. v. Young* (1984), 13 C.C.C. (3d) 1 (Ont. C.A.), at 31; *R. v. Jewitt* (1985), 21 C.C.C. (3d) 7 (S.C.C.), at 14; *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.), at 33.

[33] As his second ground of appeal, the appellant submits that, "[t]he military judge erred in dismissing the application for a stay of proceedings in not providing the appellant with a right to re-elect and in not relying on any law or jurisprudence in support of his decision."[4]

Omission to give the appellant an opportunity to re-elect mode of trial

[34] This submission may be disposed of summarily. Pursuant to Section 108.17(3) of the QR&O, an accused may withdraw an election to be tried by court martial at any time prior to the DMP preferring a charge. Assuming that the appellant was told about the additional charges of abuse of office shortly after the charge sheet was signed on November 22, 2007, he had an unconditional right to withdraw his election until December 4, 2007, being the date the charges were preferred, and did not. After the charges were preferred, he could withdraw his election with the consent of the DMP at any time up to the commencement of this trial on May 7, 2008. The appellant did not seek to do so.

[35] In these circumstances, I cannot see how the omission to give the appellant an opportunity to re-elect would be offensive to the community's sense of fair play and decency and I would dismiss this argument for a stay. I turn now to the second argument

[4] The appellant's argument that the Military judge erred in "not relying on any law or jurisprudence in support of his decision" only appears at the Index to his factum and is not elaborated on further in his submissions with regards to the rest of his second ground of appeal, namely that the Military judge erred in dismissing the application for a stay of proceedings in not providing the appellant with a right to re-elect.

advanced by the appellant as to why a stay should be granted which I take to be that the military judge's decision is not entitled to deference and that we should consider the overall effect of the circumstances.

Whether military judge's dismissal of stay entitled to deference and whether overall circumstances entitle appellant to a stay

[36] The Military judge's brief reasons in dismissing the appellant's application for a stay are reproduced in full below:

> The application is dismissed. While I accept the evidence of the applicant as to the effects upon him, both professionally and personally, of the laying of the charges, including the additional charges preferred by the Director of Military Prosecutions, I am not persuaded that the circumstances amount to the clearest of cases which would justify the ultimate remedy of putting a stop to the prosecution. I reach this conclusion particularly having regard for the agreed facts that the most recent charges, No. 2 and No. 3, are related in some way to the original charge, now charge No. 1, and that no complaint is made of bad faith or improper motive on the part of the prosecution in laying the additional two charges. The application is denied.

[37] As indicated, a stay is reserved for the 'clearest of cases': *R. v. O'Connor, supra,* at para. 68. It is an exceptional remedy that will only be appropriate when (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice: *R. v. Regan*, [2002] 1 S.C.R. 297*,* at para 54. Where the abuse of process would not affect trial fairness, there is still a narrow residual category of cases where a stay may be granted because the fundamental justice of the

system is undermined. When there is uncertainty about whether the abuse is sufficient to warrant the drastic remedy of a stay, it is appropriate to balance the interests that would be served by granting a stay of proceedings against the interest that society has in having a final decision on the merits: *Regan, supra,* at para. 56.

[38] Before embarking on an analysis of the overall effect of the circumstances, I must deal with the respondent's submission, that the Military judge's exercise of discretion as to whether an abuse of process has occurred, is entitled to deference. In *Regan, supra* at para. 117, Lebel J., for the majority stated:

> The decision to grant a stay is a discretionary one, which should not be lightly interfered with:"an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice" (*Tobiass, supra,* at para. 87; *Elsom v. Elsom,* [1989] 1 S.C.R. 1367 at p. 1375).

[39] I read the appellant's submission that the Military judge did not rely on any jurisprudence to be a submission that the Military judge's reasons disclose an error in principle in the manner in which he exercised his discretion, and as a result, they are not entitled to deference from this court.

[40] One of the reasons for which the Military judge dismissed the appellant's application was that the abuse of authority charge was related to the conduct charge, to which he had pled guilty. The fact that the appellant admitted to breaching the rules of conduct and good order *cannot*, standing alone, be a basis for holding that the

subsequent charge of abuse of authority to which he did not admit, should not be stayed. I also note that there was no issue of a stay in relation to the second charge, failing to report his inappropriate relationship with the Private, because, as I indicated at the outset of these reasons, this charge was dismissed following a pre-trial motion by the appellant.

[41] In addition to being logically flawed, the military judge's analysis was incomplete. He referred to only two factors, the lack of any complaint respecting bad faith or improper motive, before concluding that this was not the clearest of cases and dismissing the application for a stay.

[42] Bad faith or improper motive on the part of the prosecution, are but two of the many factors to be taken into account. The trial judge did not consider the residual category of abuse of process that does not relate to conduct affecting the fairness of the trial, but instead addresses a panoply of diverse circumstances, such that our fundamental notions of fairness and justice are offended. As stated by Robert J. Frater in his text, *Justice within the Limits of the Law: Prosecutorial Misconduct*, (Aurora, Ont.: Canada Law Books, 2009), at p. 95:

> Other factors considered by the court included the seriousness of the offence, the length of the proceedings, whether the accused had been in pre-trial custody or served the sentence and the trauma/stigmatization experienced by the accused. Obviously, some form of prejudice will be critical; the mere fact that the prior proceeding ended in a mistrial is insufficient.

[43] The Military judge did not consider the cumulative effect of the diverse factors, mentioned above, in relation to whether there was an abuse of process. He appears to have been of the opinion that they were only relevant with respect to sentence.

[44] On this basis, I would hold that the Military judge's reasons disclose errors in principle and that I am not bound to give deference to his decision. I must now consider the appellant's submissions in relation to the other factors enumerated above.

Other Factors

Seriousness of the charges

[45] The charge of abuse of authority is much more serious than the charge of disobeying the order of a superior officer which was not relaid. The charge of conduct contrary to good order and discipline encompasses a wide range of conduct and its seriousness is dependent on the circumstances. For example, conduct involving a sexual assault of a person would generally be more serious than a sexual relationship between two consenting adults because the latter does not involve any disrespect, coercion or loss of dignity towards the other person. Obviously, if the conduct involves an officer who directly commands or instructs a private, that is another circumstance that would render the conduct more serious. The conduct charge here, while serious, is at the lower end of the scale.

Length of proceedings

[46] The appellant submits the extended delays he underwent "are repugnant to the fundamental right … to the military justice system['s] duty to act expeditiously." Instead of 21 days set out in the regulations (s. 108.45 QR&O), the review authority took an additional 76 days to make its decision to quash the verdict and reinstate the appellant to the rank of Sergeant.[5] On July 10, 2007, the conduct charge was relaid and the appellant elected trial by Court Martial. After the appellant elected trial by Court Martial, the DMP took until December 4, 2007, another 112 days, to prefer the charge of abuse of authority against the appellant. Yet, as the Military judge commented in his reasons on sentence, the particulars respecting the abuse of authority charge appear to have been known by early February 2007. No explanation has been given for this delay.

Prejudice

[47] The review of the appellant's summary trial resulted in the conduct charge being quashed, as opposed to his sentence being reviewed and potentially reduced as he had requested. The appellant could have sought judicial review of this outcome within 30 days of the decision. However, as the appellant did not contest the facts underlying the conduct charge, he had little reason to seek judicial review of the quashing of this charge at the time. The effect of the charges being quashed was to restore him to his former rank. The notice he received at the time the charges were quashed referred to the fact a

[5] The appellant was restored to the pay scale of a sergeant retroactively.

new trial could be held "*in connection with the facts which gave rise to both charges tried"*. The notice he received did not state new charges could be laid and the information that a new trial could be held, referred to the facts regarding previous conduct and disobedience, not new facts. The appellant had little reason to think that the outcome of the review process would place him in the greater jeopardy that it did. If, and when, the charges were relaid, he could admit the particulars respecting the conduct charge and put forward his explanation respecting the charge of disobeying a superior officer. He would have a fresh opportunity to make submissions as to sentence. By the time the charge of abuse of office was laid, the appellant was substantially out of time to seek judicial review of the quashing of the conduct charge. While he could have applied for leave of the court to extend the time for judicial review, I cannot speculate on the likelihood that leave would have been granted. Given that the time for seeking judicial review of the reviewing authority`s decision to quash the conduct charge, as opposed to merely reviewing his sentence, had elapsed, and the outcome of any application for leave would have been uncertain, the delay in laying the abuse of authority charge significantly prejudiced the appellant. The conduct of the trial aggravated the prejudice to the appellant and no remedy but a stay is reasonably capable of removing that prejudice.

Sentence/Stigmatization

[48] As I have indicated, the appellant began serving his sentence immediately after his summary trial. The appellant went from being a Sergeant, which is a senior non-

commissioned officer rank, to being a Corporal, which made him a member of a troop. He had to move all of his personal effects to new living accommodations, change eating and social facilities and endure more limited freedom of movement. He regularly encountered persons of the armed forces that he had instructed as recruits. In addition, he underwent a reduction in pay of $575 a month. By the time the charges against him were quashed and he was restored to the rank of Sergeant, he had already suffered significant stigma as a result of having served a sentence of reduction in rank for 97 days.

[49] Having regard to the unique circumstances of this case, I would hold that the cumulative effect of these factors offends the community's sense of fair play and outweighs the public interest in having a decision on the merits respecting the abuse of authority charge. Thus, this case falls within the exceptional residual category of cases warranting a stay. Accordingly, I would order that the abuse of authority charged be quashed.

(3) Was the sentence imposed too severe?

[50] Section 240.1 of the NDA provides that:

> On the hearing of an appeal respecting the severity of a sentence, the Court Martial Appeal Court shall consider the fitness of the sentence and, if it allows the appeal, may, on such evidence as it thinks fit to require or receive, substitute for the sentence imposed by the court martial a sentence that is warranted in law.

[51] In sentencing the appellant, the Military judge took into account all the pertinent considerations on sentence including the following:

> (a) The appellant was a first time offender with no recidivism risk;
>
> (b) The appellant had already been tried by summary trial;
>
> (c) The appellant suffered the stigmatization of a reduction in rank for 97 days;
>
> (d) The cumulative proceedings launched against the appellant were, as the military judge commented, "an unusual aspect of procedure";
>
> (e) The appellant pleaded guilty to the conduct charge; and
>
> (f) The relationship between a Sergeant instructor and recruit candidates on a Basic Military Qualification course is very special. The appellant betrayed the trust reposed in him by the course candidates and by the Canadian Forces.

[52] Despite finding the appellant guilty of the charge of abuse of authority, in addition to the conduct charge, the Military judge concluded that "it would only be in exceptional circumstances that the punishment at court martial should exceed the punishment imposed at summary trial for the same offence when the finding and sentence at summary trial have been quashed." He sentenced the appellant to the same sentence he had received at his original trial, namely a reduction in rank from Sergeant to that of Corporal.

[53] The sole question is whether the sentence is manifestly excessive having regard to the fact that I would order a stay on the abuse of authority charge. The only charge with which I am concerned is the conduct charge. While I note that the Military Judge took into account all the pertinent considerations on sentence, his analysis was done in respect of the two charges before him.

[54] In my view, a reduction of rank from Sergeant to Corporal is outside the appropriate range of sentence for this offence and this offender, having regard to the requirement that the proper punishment to be imposed is to be, as the Military Judge aptly noted in his reasons, "the least severe punishment that will maintain discipline." As stated by the Military Judge, "[t]he sentence should be broadly commensurate with the gravity of the offence and the blameworthiness or degree of responsibility and character of the offender."

[55] The scale of punishments is found in s. 139(1) of the NDA and reads as follows: The following punishments may be imposed in respect of service offences and each of those punishments is less than every punishment preceding it: (a) imprisonment for life; (b) imprisonment for two years or more; (c) dismissal with disgrace from Her Majesty's service; (d) imprisonment for less than two years; (e) dismissal from Her Majesty's service; (f) detention; (g) reduction in rank; (h) forfeiture of seniority; (i) severe reprimand; (j) reprimand; (k) fine; and (l) minor punishments.

[56] The appellant has put forward a number of decisions respecting sentence in support of his position that the sentence is manifestly excessive. In one of those decisions a Master Corporal was intimately involved with two private recruits and was charged under s. 129 of the NDA: *R. v. McIntyre* (1990), CM-46/90. He had served in the military for 12 years and had a record of previous military offences. He had been twice convicted for an offence contrary to section 80 of the NDA in that he twice absented himself without leave. He received a reprimand for the first offence and a recorded caution for the second. In connection with the offence under s. 129 of the NDA, the Military judge sentenced the appellant to a severe reprimand and a fine of $3,000. No reduction of rank was imposed. None of the other cases put forward by the appellant where conduct contrary to the prejudice of good order and discipline was found resulted in a sentence of a reduction in rank.

[57] The respondent has put forward only two authorities that deal with sentence. One is instructive: *Sheehy-Tremblay v. The Queen*, 2003 CMAC 2 [*Sheehy-Tremblay*]. It concerns an appeal of sentence with respect to five offences of which the appellant was found guilty, and for which the punishment was a reduction of two ranks, from Captain to Second Lieutenant, as well as a fine of $4,500. The offences involved one charge of touching a young person, with whom Sheehy-Tremblay was in a position of trust or authority, for a sexual purpose, and four charges of familiarity towards officer cadets,

contrary to Standard Operating Procedures 203.2 of the Canadian Forces Leadership and Recruit School.

[58] The offences in *Sheehy-Tremblay* involved two female cadets, ages 17 and 18. The circumstances included a drinking game, played openly at a graduation party held in the officers' mess, in which Sheehy-Tremblay licked a cadet's neck, placed salt on it, and then licked the salt off. The female cadet then challenged Sheehy-Tremblay to use his teeth to retrieve the remote control for the sound system from under her bra strap, which he did. Sheehy-Tremblay then left the mess with the cadet for about an hour, during which he allegedly showed her travel photos and told her he would like to see her again after the course. The same night, he met with an underage cadet, who had been removed from the course the appellant was supervising as a result of her academic failures. She and the appellant discussed how she could improve her performance when she retook the course and were the last to leave the premises at approximately 4 a.m. Her evidence, which the Military judge accepted, was that Sheehy-Tremblay kissed her on the cheek and on the neck in the officers' mess before they left. They got into an elevator and Sheey-Tremblay put his arms around her and kissed her putting his tongue into her mouth until she got off at her floor and went to her room alone. Sheehy-Tremblay then went to the room of another female officer cadet who had invited him to spend the night because he was in no condition to drive. Although the decision notes that that too was contrary to

regulations, it does not appear that he was charged with an offence with respect to this last conduct.

[59] The respondent submits that the offences in Sheehy-Tremblay are less serious than the charge with which the appellant was charged, in that the offences took place on a single evening, Sheehy-Tremblay had been drinking and full sexual relations did not take place. I disagree. Sheehy-Tremblay was convicted of five offences including an offence under the *Criminal Code*, R.S.C. 1985, c. C-46 involving an underage person. Further, Sheehy-Tremblay was told by a fellow officer that his conduct with the cadets was inappropriate, yet he persisted in this conduct. Having regard to his deliberate decision to drink, his impairment due to alcohol was not a mitigating factor. The conduct was blatant and its effect on conduct to the prejudice of good order is apparent. Sheehy-Tremblay did not plead guilty to the charge involving the underage cadet and, as a result, he was not entitled to any reduction in sentence for remorse.

[60] While the appellant's conduct took place over a period of four or five weeks, it was with a consenting adult; it was *not* criminal or wanton and was not initiated by him. The evidence on the record supports the appellant's assertion that the conduct was out of character for him. Furthermore, the appellant never contested the particulars respecting his conduct and his plea of guilt was an expression of remorse. While the respondent submits that the precedent relied on by the appellant is dated, having taken place in 1990, the fact that the respondent has been unable to put forward a single more recent precedent

involving facts similar to that of the appellant's and one where a reduction in rank was imposed, speaks volumes.

[61] Accordingly, I would hold that the sentence imposed is manifestly excessive as being outside the range of sentence for this offence and this offender.

CONCLUSION

[62] For the reasons given, I would allow the appeal as to sentence. In its place, having regard to the factors discussed above as well as the 97 days demotion served by the appellant I would substitute a sentence of a severe reprimand and a fine of $2500.

"Karen M. Weiler"
Weiler J.A.

I agree

"Johanne Gauthier"
Johanne Gauthier J.A.

I agree

« Russel W. Zinn »
Russel W. Zinn J.A.

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

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