Date: 19981230
Docket: CMAC-418

CORAM: **The Honourable Chief Justice Strayer**
The Honourable Mr. Justice Joyal
The Honourable Madam Justice Weiler

BETWEEN:

CAPTAIN LUC PAQUETTE

Appellant,

--and--

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, Monday, October 19, 1998

Judgment delivered at Ottawa, Ontario, Wednesday, December 30, 1998

REASONS FOR JUDGMENT BY: WEILER J.A.

CONCURED IN BY: STRAYER J.A.

DISSENTING REASONS FOR JUDGMENT BY: JOYAL J.A.

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REASONS FOR JUDGMENT

-WEILER J.A.:

[1] The appellant pled guilty to two counts of sexual exploitation under section 130 of the *National Defence Act*, contrary to ss 153(1)(*b*) of the *Criminal Code*, and four counts of conduct to the prejudice of good order and discipline under section 129 of the *National Defence Act*. He was sentenced to five months imprisonment by the President of the Standing Court Martial. The appellant seeks leave to appeal his sentence and, if leave is granted, appeals his sentence. For the reasons which follow I would grant leave to appeal sentence, allow the appeal, and impose a sentence of 90 days imprisonment.

[2] The appellant accepts that the standard of review on this appeal is that the sentence must be shown to have been imposed as a result of wrong principles or that it is clearly or manifestly excessive: *R. v. Shropshire*, [1995] 4 S.C.R. 227.

[3] The facts upon which the pleas of guilty were based are outlined in the Statement of Circumstances submitted to the Court in writing pursuant to Queen's Regulations and Orders 112.27(1). I have summarized them as follows.

[4] Captain Paquette, a Cadet Instructor Cadre Officer, was employed as an instructor and training officer at the Borden Air Cadet Summer Training Centre during the summer of 1997 until August 5th. The events that led to Captain Paquette's convictions occurred during two evening sessions of "Truth or Dare" around the campfire on July 28, 1997 and July 30, 1997. At each session, cadets of both sexes were in attendance and Captain Paquette was the only commissioned officer present.

[5] Although playing "Truth or Dare" was regarded as a tradition at the training site over the years, the activities on these two occasions progressed from the usual dares, to dares involving partial and full nudity, as well as simulated sexual activity. All of the cadets who were required to perform these dares were being supervised by Captain Paquette and were between fourteen and seventeen years old.

[6] On July 28th, one male cadet was dared to remove all his clothes and "streak" past the group. This fifteen-year-old asked the appellant if he had to comply with the dare and was told

"yes." Although he felt uncomfortable, the cadet complied because he felt he had no choice but to obey the appellant. Other dares performed on this evening included a male cadet simulating anal sex with a female cadet, simulation of masturbation, emulation of a "moose in heat", a male and female cadet removing marshmallows from each other's body with their mouths, and a sixteen-year-old female cadet being told by the appellant that she must lick peanut butter off the chest of the same male cadet who had earlier been forced to "streak" through the campsite. She refused, but when told that she must comply to remain part of the group, she requested, and was allowed, to select another fifteen-year-old male partner from the group. The two were then obliged to lick peanut butter from each other's chest. Again, the cadet felt she had no choice but to comply because of the appellant's rank. After completion of this act, Captain Paquette was heard to say, "Now that's a dare." As part of the coercion that evening, members of the staff stated that the group had better come up with "better" dares or they would have to go to bed. Captain Paquette apparently watched the evening's activities with approval and at no point did he intervene to stop them.

[7] It is noteworthy that the appellant told the cadets that he would not perform any dares, but would only answer truths, as it would be inappropriate for a commissioned officer in the Canadian Forces to perform any act even slightly self-degrading.

[8] On the evening of July 30th, the "streaking" dare and the dare to lick peanut butter off another's chest were repeated. The seventeen-year-old female cadet forced to perform the peanut butter dare on the second night was mildly allergic to peanuts, and Captain Paquette was aware

of this. She subsequently said that she was "freaking" when the appellant told her to remove her top, that she hated the appellant for making her comply, and that she only did so because of his rank. During the performance of this dare, the appellant urged the participants to "come on" and perform it. After it was completed, he gave her four cigarettes for having completed it. The sixteen-year-old male cadet who was forced to streak had flashlight beams shone on his genitals as he performed the dare and was visibly unhappy.

[9] Another dare on this second evening included a fourteen-year-old female cadet being told to remove her clothing except for her brassiere and panties and sit on the lap of a male cadet, kiss him, and tell him she loved him. Another cadet objected on her behalf that the dare was unfair since she didn't believe the cadet was wearing a brassiere. The cadet was told by the appellant that she must complete the dare. She, too, was visibly distressed.

[10] Other dares included cadets being forced to simulate a "sixty-nine" while clothed, and a female cadet being forced to dance around the fire clad only in her underwear and covered by a sheet of newspaper. In another instance where a cadet elected a "truth", Captain Paquette asked him whom in his flight he most wanted to sleep with. Again on this evening, cadets were incited by members of the staff to make the dares more interesting or they would have to go to bed. Also, the appellant was apparently repeatedly challenged on the appropriateness of the dares, and the appropriateness of cadets removing their clothing.

[11] First, the appellant submits that the President erred in principle in relying on the decision of the Supreme Court of Canada in *R. v. Généreux*, [1992] 1 S.C.R. 259 as a basis for increasing the sentence on the facts of the case.

[12] In his reasons for sentence the President stated:

> The civilian courts have recognized the requirement for and the validity of the Canadian Forces' unique code of discipline and its separate justice system to enforce and maintain that code. The Supreme Court of Canada recognized in *R. v. Généreux* that breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. In this case, where the military has placed the officers and non-commissioned members of the cadet instructors cadre in charge of, and in a position of authority over young cadets at a summer cadet camp, away from their parents, the punishment may well have to be more severe than in the purely civilian context to properly account for the additional factor of military discipline.

[13] The appellant submits that the rationale for the comment of Chief Justice Lamer in *Généreux*, namely, the need to have a force of men and women to defend against threats to the nation's security, and the need to enforce internal discipline effectively and efficiently in order to maintain the armed forces in a state of readiness, is not applicable here.

[14] It is true that the rationale in *Généreux* is not directly applicable here. However, as I read the reasons of the President, he was not referring to *Généreux* for this reason. Earlier in his reasons he stated that the primary principle with which he was concerned was the protection of the public. In his opinion that principle was best achieved by a punishment of deterrence, both

specific and general, and that denunciation was also a consideration. It is in that context that the reference to *Généreux* was made.

[15] What is involved in this case is a breach of public trust. A breach of public trust is regarded as more serious than a breach of private trust: see Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2nd ed., (August 1998), Vol. 1 at 18:0740 and cases cited there. As I read the reasons of the President that is what he meant in referring to *Généreux*, and, therefore, he did not err in this regard.

[16] Second, the appellant submits that the President erred in principle in failing to give proper consideration to the joint submission of the prosecutor and defending officer that a sentence of 30 days imprisonment be imposed. Or, in any event, that the sentence was too severe.

[17] The president noted that the precedents cited by the defence and the prosecution were not directly on point. They did not involve cadets under the age of 18 and sexual exploitation. In rejecting the joint submission he stated:

> In my view, a sentence of 30 days incarceration is unreasonable and inadequate in the circumstances. We have six offences involving several young victims wherein the offender, a commissioned officer in charge of cadets undergoing adventure training, committed two sexual exploitation offences, counselled cadets to perform other degrading acts involving partial nudity and simulated sexual activity and harassed cadets into performing other embarrassing acts.
>
> Sentencing is of course in the discretion of the trial judge in a Standing Court Martial. It cannot be limited by counsel's submissions. Joint sentencing submissions, or an agreement on sentence, should of course only be disregarded where it is clearly

> not appropriate, that is, it is clearly outside the accepted range of sentences for similar offences. In my opinion, the acceptable global sentence for these six offences involving numerous young victims is between six and twelve months imprisonment. I am well aware that by operation of section 140(c) of the National Defence Act any such period of imprisonment is deemed to include a sentence of dismissal from Her Majesty's service.
>
> Taking into account the mitigating factors of the guilty pleas, remorse, co-operation, Captain Paquette's status as a first offender, his prior good service and his family and personal circumstances, I am prepared to go somewhat below what I have indicated would be the lower end of the range.

[18] The President then imposed the five month sentence.

[19] The President's comments indicate that he was aware that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or unless the sentence is otherwise not in the public interest: *R. v. Sriskantharajah* (1994), 90 C.C.C. (3d) 559 (Ont. C.A.). The President was clearly of the opinion that a sentence of 30 days imprisonment did not place sufficient emphasis on the breach of public trust which had taken place and the need to protect young persons who enroll as cadets.

[20] I agree with the President's assessment that a sentence of 30 days would not reflect the public interest in ensuring that sexually degrading activities, or "hazing", which may have been part of the military culture in the past, are no longer acceptable. I also agree with his assessment that protection of the public through a sentence which incorporates the elements of general deterrence and denunciation is of paramount importance in this case.

[21] The appellant's prior good character is not the controlling factor in sentencing in this case because it was necessary for him to be of good character in order to be placed in a position of trust toward the cadets. It is not clear to me, however, what the President meant when he stated that the proposed sentence was," outside the range of sentences for similar offences." The cases cited to the President by the defence and the prosecution involved sentences for sexual assault which ranged from a suspended sentence and a fine, to penitentiary terms for much more serious offences occurring over longer periods of time. It is acknowledged that none were directly on point.

[22] The appellant pled guilty which spared the young cadets from having to testify. In the light of the appellant's plea, the abundance of other genuinely mitigating factors, and the fact that the President found that none of the victims suffered any lasting harm, I think that an appropriate sentence should be as low as is reasonably possible without minimizing the seriousness of the offence of which the appellant has been convicted. In my opinion, a sentence of five months imprisonment is clearly excessive and a more fit sentence would be imprisonment for a period of 90 days.

[23] The appellant further submitted that this court should consider suspending any sentence of imprisonment imposed. While it is clear that a Standing Court Martial Court could have suspended sentence, I am not at all certain that a Court Martial Appeal Court has the power to suspend a sentence of imprisonment. Section 215 of the *National Defence Act*, R.S.C. 1985, c. N-5, provides that the Minister, "or such authorities as the Minister may prescribe or appoint for that purpose" may suspend the carrying into effect of a sentence of imprisonment or detention.

Although a Standing Court Martial Court is one of the authorities designated by the Minister, the Court Martial Appeal Court is not so designated. In any event, in the 1990's there has been a considerable change in societal concern respecting sexual assault and the sexual exploitation of young persons. In this case the suspension of sentence would not adequately reflect the societal concern that such conduct must not be tolerated, or the seriousness of the multiple breaches of trust.

[24] Accordingly, I would grant leave to appeal sentence, allow the appeal as to sentence, set aside the sentence of imprisonment of five months and substitute a sentence of incarceration for ninety days in its place.

[25] The appellant requested "such costs on this appeal as he has personally borne". It is understood that this refers to the cost of preliminary consultations and steps taken before his counsel was appointed by the Minister of Justice under Rule 20 to represent him in the appeal. Having regard to the fact that his appeal has been only partially successful and that most of his costs will be borne by the Minister of Justice no award of costs should be made.

[26] The ban on non-publication of the complainants' names is continued.

"Karen M. Weiler"
J.A.

I agree.
"B.L. Strayer" C.J.

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REASONS FOR JUDGMENT

JOYAL J. (DISSENTING):

[1] My colleague Weiler J.A. has fully set out in her Reasons the sexually incidents which occurred on the two evenings in question when the appellant, a Cadet Captain, was supervising the activities of cadets of both sexes. Some of these activities were certainly subject to censure, and others were degrading and embarrassing. It is conceded, however, that no one of those two evenings suffered anything remotely traumatic.

[2] The charges against the appellant were pursuant to paragraph 153(1)(b) of the *Criminal Code* and section 129 of the *National Defence Act.* Article 153 of the *Criminal Code* sets out the charge of sexual exploitation and it reads as follows:

> **153.** **(1)** Every person who is in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency and who
>
> (*a*) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a young person, or
>
> (*b*) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person,
>
> Is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction
>
> **(2)** .In this section, "young person" means a person fourteen years of age or more but under the age of eighteen years.

[3] Nothing much can be gleaned as to what is actually involved in the offence of sexual exploitation or what meaning may be ascribed to "sexual purpose". Crown counsel and defence counsel, on the basis of a guilty plea, made a joint submission to the President of the Court Martial on sentencing. Their submission was for a period of incarceration of 30 days, with or without a suspension for one year. The President dismissed their submission as being unreasonable and inadequate in the circumstances. He went on to state that the accepted range of imp0risonment for offences of this nature was between six and twelve months. Because of the guilty plea, remorse, cooperation, first offence, prior good service, family and personal circumstances, the President imposed a sentence of five months' imprisonment.

[4] My colleagues on appeal have no difficulty in allowing the appeal in part and substituting the sentence of five months' incarceration to one of three months' incarceration. My colleagues, however, agree with the Court below that the plea bargain is inadequate and not acceptable.

[5] In my respectful view, such a plea should not be casually dismissed. Any critical analysis of its adequacy or shortcoming must not be by picking a number out of a hat, whether it be six, five or three months, but by looking at all of the circumstances. Counsel for the Crown and counsel for the appellant struck a bargain: provide me with a lenient sentence, says one, and I'll save you a long and stressing trial by pleading guilty. Provide me with a guilty plea, says the other, and I'll agree to recommend a thirty-day sentence.

[6] The effect of this kind of bargain, if its terms are to be so lightly brushed aside, is to create a tremendous amount of prejudice to the accused. What is left to grab anyone's attention is the statement of circumstances, where a Court is free to recite *in extensor* all of their sleazy, tacky and tasteless particulars. A Court is unhampered by other evidence or other testimony and is free to construct a sentence to suit its own institutional agenda. With a plea bargain, no enquiry is made or required as to what is the usual level of conduct at boot camp. There is no opportunity to examine witnesses on the events in question or determine the strength and depth of the participation of the accused and, for that matter, to explore whether or not the whole charade implies a sexual purpose.

[7] On the other hand, one cannot overlook the situation of an exemplary officer cadet whose whole life has been one of dedication to his cadet duties since his early teens and who enjoyed the rank of captain and the command of the 647th Royal Canadian Air Cadet Squadron in his hometown. His situation is a discouraging one indeed.

[8] His conduct or his quiescence on the two evenings in question is without a doubt abhorrent and unjustifiable. These incidents may be an aberration, but they nevertheless resulted in the appellant losing his command, losing rank, losing status and losing his job. If one adds a period of incarceration to this, the doctrines of denunciation and deterrence have, in my respectful view, been amply respected.

[9] The other consideration which comes to mind is the wide range of sentencing meted out by court martial, involving members of the armed forces on charges of sexual assault, sexual harassment and the like, involving also a dominant and servant relationship or a position of trust. Sexual assault is far more serious than sexual exploitation and yet a fine and a reduction in rank have often been the order of the day. [See: (1) *CPO 1st Tyre,* Court Martial – 6 September 1995 – Reduction form CPO 1st to CPO 2nd, severe reprimand and $3,000 fine; (2) *Sgt. Reddick* – 22 April 1998 – 30 days suspension and $3,000 fine; (3) *Ian Smith v. H.M.P.* – CMAQC-387, 25 October 1995 – reduction in rank reduced to severe reprimand]. [See also: *Regina v. Carder* (1995), A.J. No. 965, Albert court of Appeal; *Regina v. Pashe* (1995) M.J. No. 75, Manitoba Court of Appeal; *Regina v. Clouthier* (1996) O.J. No. 1196, Ontario General Division.]

[10] It has been said that one of the important aspects of plea bargaining is that counsel for the Crown and counsel for the case are usually far more knowledgeable about the case than is the Court. All the more reason, therefore, to attach importance to an respect for these pleas. Counsel for the Crown is not a fool and I see no reason to suspect that he is not fully aware and conscious of the public interest.

[11] In that respect, I note that Crown counsel, on appeal, gave unqualified support to the judgment below. I find this most disturbing. It is, in effect, a repudiation of a commitment which has secured a plea of guilty. There may not be unanimity on this, but nevertheless, I subscribe to the view expressed by Hugessen J. in respect of repudiation, in *A.G. of Canada v. Roy*, C.R.N.S., Vol. 18, p. 89, at 93:

> The Crown, like any other litigant, ought not to be heard to repudiate before an appellate court the position taken by its counsel in the trial court except for the gravest possible reason.

[12] To sum up, the sentence below is wrong by reason of its severity. There is no discernable point of reference for a five month sentence. Furthermore, and with all due respect, I find it difficult to subscribe to the three month sentence of my colleagues. There is no discernable point of reference for that term either. There is only one point of reference left to us and that is, of course, the joint submission.

[13] I would, therefore, grant leave to appeal sentence, allow the appeal as to sentence and sentence the appellant to 30 days suspended for one year.

L-Marcel Joyal
Judge

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

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DISSENTING REASONS FOR JUDGMENT BY:	Joyal J.A.
DATED:	December 30, 1998

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