

Citation: *R. v. Lieutenant-Commander L.J. McNally*, 2007 CM 2009

Docket:200729

**STANDING COURT MARTIAL
CANADA
QUÉBEC
ASTICOU CENTRE, GATINEAU**

Date: 8 June 2007

PRESIDING: COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN

v.

**LIEUTENANT-COMMANDER L.J. McNALLY
(Offender)**

Warning

The court has directed that the identity of and any information that could disclose the identity of any person as being an individual who was a patient of the witness shall not be published in any document or broadcast or transmitted in any way.

SENTENCE

(Rendered Orally)

[1] Lieutenant-Commander McNally, having accepted and recorded your pleas of guilty to charge No. 1, a charge of wilfully making a false entry in an official document, and to charge No. 4, an act of a fraudulent nature, this court now finds you guilty of charges number one and four.

[2] It now falls to me to determine and to pass a sentence upon you. In so doing I have considered the principles of sentencing that apply in the ordinary courts of criminal jurisdiction in Canada and at courts martial. I have as well considered the facts of the case as disclosed by the evidence I have heard and the materials submitted during the mitigation phase, as well as the submissions of counsel both for the prosecution and for the defence.

[3] The principles of sentencing guide the court in the exercise of its discretion in determining a fit and proper sentence in an individual case. The sentence should be broadly commensurate with the gravity of the offence and the blameworthiness, or degree of responsibility, and character of the offender. The court is guided by the sentences imposed by other courts in previous similar cases, not out of a slavish adherence to precedent, but because it appeals to our common sense of justice that like cases should be treated in similar ways. Nevertheless, in imposing sentence the court takes account of the many factors that distinguish the particular case it is dealing with, both the aggravating circumstances that may call for a more severe punishment, and the mitigating circumstances that may reduce a sentence.

[4] The goals and objectives of sentencing have been expressed in different ways in many previous cases. Generally, they relate to the protection of society, which includes, of course, the Canadian Forces, by fostering and maintaining a just, a peaceful, a safe, and a law abiding community. Importantly, in the context of the Canadian Forces these objectives include the maintenance of discipline, that habit of obedience which is so necessary to the effectiveness of an armed force.

[5] The goals and objectives also include deterrence of the individual so that the conduct of the offender is not repeated and general deterrence so that others will not be led to follow the example of the offender. Other goals include the rehabilitation of the offender, the promotion of a sense of responsibility in the offender, and the denunciation of unlawful behaviour. One or more of these goals and objectives will inevitably predominate in arriving at a fit and just sentence in an individual case. Yet it should not be lost sight of that each of these goals calls for the attention of the sentencing court, and a fit and just sentence should be a wise blending of these goals tailored to the particular circumstances of the case.

[6] As I told you when you tendered your pleas of guilty, section 139 of the *National Defence Act* prescribes the possible punishments that may be imposed at court martial. Those possible punishments are limited by the provision of the law which creates the offense and provides for a maximum punishment, and are further limited to the jurisdiction that may be exercised by this court. Only one sentence is imposed upon an offender whether the offender is found guilty of one or more different offences, but the sentence may consist of more than one punishment. It is an important principle that the court should impose the least severe punishment that will maintain discipline.

[7] In arriving at the sentence in this case I have considered the direct and indirect consequences for the offender of the findings of guilt and the sentence I am about to impose.

[8] The facts of the offences are described in a Statement of Circumstances, Exhibit 3. In brief, shortly before she was to be posted to Geilenkirchen, Germany, the

offender, who was then the wing surgeon at Canadian Forces Base North Bay, executed a statutory declaration attesting to being a party to a common law relationship with a non-commissioned member who was one of her subordinates in the health services detachment. It appears that at the time of the declaration, the offender and the other member were indeed romantically attached, but had not resided together as spouses for at least one year prior to the date of the declaration as the offender attested.

[9] Common law spousal status entitles the member to be reimbursed out of public funds for certain costs, including a posting allowance, as well as certain expenses incurred in respect of the spouse such as airfare to the posting location and meals. These expenses were claimed by the offender although she was not entitled to do so. The total of the financial benefits fraudulently claimed and received is \$11,053.

[10] Counsel for the prosecution and for the defence agree that a fit sentence in this case is a severe reprimand and a monetary fine. They disagree as to the proper size of the fine. The prosecution correctly points out that a fraud upon public funds by an officer is a serious offence. A large sum of money is involved none of which has yet been repaid. The deceit continued over a period of some six months. Also, it appears to me that the offender had to enlist the help of the junior member to some extent in order to carry out the offences. In these circumstances the court is most concerned about the sentencing principles of general deterrence and denunciation.

[11] There are also certain mitigating circumstances relating to the personal situation of the offender. About a year prior to the time of the false declaration, the offender's husband of some 16 years left without warning. The offender testified that she was devastated by the breakup of her marriage, sought medical help, and was treated for depression. She has 32 years of service in the Canadian Forces, rising through the ranks to obtain a commission and later qualifying as a medical doctor. Her work as a medical officer in the forces is described in glowing terms by those who know it. And I accept the evidence that she continues to enjoy the confidence and trust of her chain of command notwithstanding the nature of the offences.

[12] She has pleaded guilty at the first opportunity. I do not accept the submission of the prosecutor that the dropping of charges two and three by the prosecution somehow exhausts the credit the offender would otherwise be entitled to receive for her pleas of guilty. When I consider as well the fact that she made a full and early admission of responsibility to the investigators of the National Investigation Service I am satisfied that the offender truly regrets her criminal behaviour.

[13] I also consider the passage of time since the offences were fully investigated until disposition at court martial to be a mitigating factor in this case. I should say, however, that I do not accept the submission of the defence that the police investigators were dilatory in proceeding with charges. I am simply not persuaded on the

strength of the evidence I have heard that such a conclusion should be drawn in this case. I am also mindful of the fact that administrative measures may be taken to recover the monies fraudulently obtained by the offender.

[14] Finally, I have considered the effect of the disciplinary proceedings taken against the offender by the College of Physicians and Surgeons of Ontario. I expect that the focus of the disciplinary concerns of the College was the relationship of the offender to the junior member who, in addition to being her subordinate, was also considered to be a patient of the offender. But I am told and I accept that the College was also aware of the offences with which the offender was charged at the time of the disposition of the disciplinary proceedings by the College.

[15] In many circumstances a case like this one would require the court to consider whether, as part of the sentence, the offender should lose his or her rank. I have indeed given such consideration in this case. But taking into consideration all of the circumstances both of the offences and of the offender I am satisfied that the range of sentence proposed by counsel is fit.

[16] Stand up, Lieutenant-Commander McNally. You are sentenced to a severe reprimand and a fine in the amount of \$3,000. The fine is to be paid in monthly installments of \$300 each commencing 30 June 2007 and continuing for the following nine months. In the event you are released from the Canadian Forces for any reason before the fine is paid in full the then outstanding unpaid balance is to be paid the day prior to your release.

[17] March out Lieutenant-Commander McNally.

[18] The proceedings of this court martial in respect of Lieutenant-Commander McNally are hereby terminated.

COMMANDER P.J. LAMONT, M.J.

Counsel:

Major S.A. MacLeod, Directorate of Military Prosecutions
Counsel for Her Majesty the Queen
Lieutenant-Colonel J.E.D. Couture, Directorate of Defence Counsel Services
Counsel for Lieutenant-Commander L.J. McNally