COURT MARTIAL

Citation: *R. v. Pfahl*, 2014 CM 3025

Date: 20141208
Docket: 201444

Standing Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal F.P. Pfahl, Offender

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Corporal Pfahl was found guilty by this Standing Court Martial of one charge for an offence punishable under section 130 of the *National Defence Act*; that is, attempt to commit the offence of production of a substance contrary to section 7 of the *Controlled Drugs and Substances Act*.

[2] Now, the responsibility is on the military judge presiding at the court martial to determine the sentence.

[3] In the particular context of an armed force, the military justice system constitutes the ultimate means of enforcing discipline which is a fundamental element of military activity in the Canadian Forces. The purpose of this system is to prevent misconduct or, put in a more positive way, to promote good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusting and reliable manner, successful missions. The military justice system also ensures that public order is maintained and that those subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[4] It has long been recognized that the purpose of a separate system of military justice or tribunal is to allow the Armed Forces to deal with matters that pertain to the respect of the Code of Service Discipline and the maintenance of efficiency and the morale among the Canadian Forces, see *R. v. Généreux*, 1992 1 S.C.R. 259 at 293. The Supreme Court of Canada in the same decision recognized at paragraph 31 that:

> Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline.

[5] That being said, the punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances.

[6] Here in this case, the prosecutor and the offender's defence counsel made a joint submission on sentence to be imposed by the Court. They recommended that this Court sentence you to a severe reprimand and a fine in the amount of $2,000. Although this Court is not bound by this joint recommendation, it is generally accepted that a sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons means where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute, or would be contrary to the public interest, see *R. v. Taylor*, 2008 CMAC 1 at paragraph 21.

[7] The fundamental purpose of sentencing in a court martial is to ensure respect of the law and maintenance of discipline by imposing sanctions that have one or more of the following objectives:

(a) to protect the public which includes the Canadian Forces;

(b) to denounce unlawful conduct;

(c) to deter the offender and other persons from committing the same offence;

(d) to separate offenders from society when necessary; and

(e) to rehabilitate and reform offenders.

[8] When imposing a sentence, the military court must also take into consideration the following principles:

(a) A sentence must be proportionate to the gravity of the offence. A sentence must be proportionate to the responsibility and previous character of the offender.

(b) A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

(c) Offenders should not be deprived of liberty, if applicable in the circumstances, if less restrictive sanctions may be appropriate in the circumstances. In short, the court should impose a sentence of imprisonment or detention only as a last resort, as it was established by the Court Martial Appeal Court of Canada and the Supreme Court of Canada decisions.

(d) Lastly, all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[9] Here, the Court is of the opinion that sentencing in this case should focus on the objectives of denunciation and specific deterrence as suggested by both counsel.

[10] The Court is dealing with an offence of attempting to produce psilocybin. As mentioned by Judge Dutil in his decision of *R. v. Humphrey*, 2011 CM 1009:

> The Court Martial Appeal Court and numerous courts martial have constantly held that the use and the trafficking of drugs is more serious in the military community because of the very nature of the duties and responsibilities of every Canadian Forces member in ensuring the safety and the defence of our country and of our fellow Canadian citizens. The military community cannot tolerate breaches to its strict and well-known policy prohibiting the use of illicit drugs. However, these broad statements must be applied in the context of individual cases and the appropriate sentencing principles and objectives.

[11] During the period of the years 2012 and 2013, Corporal Pfahl was a member of 2 Combat Engineer Regiment. Through the admissions he made, it appears to the Court that he had some acquaintance with Sapper Harley. Between the period of November 2012 and February 2013, various discussions took place between those two individuals concerning the production of “magic mushrooms”. This relationship was established through text messages sent between both individuals. Essentially, what was discussed is the manner on how to grow “magic mushrooms” and when to start to produce it. On 24 February 2013, Corporal Pfahl’s residence was searched and the police found, at that location, twenty-one Mason jars. This search revealed that Corporal Pfahl was unsuccessful in attempting to grow “magic mushrooms” at his home with those jars.

[12] As I mentioned earlier, this Court must consider the aggravating factors and mitigating factors in relation to this matter. Concerning the aggravating factors:

(a) The first thing the Court has to consider is the objective seriousness of the offence. For an offence made under section 7 of the *Controlled Drugs and Substances Act* involving a Schedule III substance, the maximum punishment for such offence is 10 years' imprisonment. However, considering that Corporal Pfahl is charged for an attempt of

committing such offence, the effect of paragraph 463(d)(i) of the *Criminal Code* basically cuts in half this maximum punishment to a maximum of five years' imprisonment for attempt to commit the offence.

(b) With respect to the subjective seriousness of the offence, the Court considered three things:

i. First, the lack of integrity and responsibility disclosed by your behaviour. Essentially, as a member of the Canadian Forces, you are aware of the Zero Tolerance policy on the use of drugs in the Canadian Forces. Despite that, you made a personal decision to produce some kind of drug. It shows that, at the time, you had complete disrespect in doing such a thing within a military context.

ii. The evidence also disclosed, as a matter of circumstances, that in order to do such thing, premeditation was required. To produce this type of drug, you had to deliberately plan things in order to succeed with such an objective, meaning that you had to find a way to do it, to get the proper equipment in order to realize the steps and research on how to effect a result. Such procedure took time and you would have been able to stop at any point in the process but you put it to the end.

iii. Finally, I have to consider, as a matter of subjective seriousness, the location. Basically, you proceeded with that near a defence establishment. You were so close that, essentially, you were in a position to provide easy access to the substance to fellow members of the Canadian Forces.

[13] In considering the mitigating factors:

(a) The first thing I have to consider is any admissions you made, any regret you showed and expressed and your full cooperation once you were arrested and things were seized from your home. Basically, these actions demonstrate that you took full responsibility for what you did, and it shall be considered.

(b) There is also the fact of the non-commercial aspect with respect to this attempt to produce. Basically, what facts tell the court is that you were not acting for financial gain nor in a manner to spread it among fellow members of your unit or throughout other units on the base. The Court may infer then that it was for personal use without any other indication and because intent was limited in scope, it must be considered by the court as a mitigating factor.

(c) Another aspect is your age and your career potential - 24 years old. You consider that old, but you are young, in the sense that you may have some experience as a matter of working with the Canadian Forces, but also, as you mentioned, since the age of 18, it is probably the only working environment you know.

(d) You still have career potential within the Canadian Forces and it must be considered by the Court.

(e) Also, you had to face this court martial which is a public forum announced to others. You have to come in public before your peers, superiors, and fellow members of the Canadian Forces. The court martial is still an event, per se, on a base which contributes to deterring people from committing any offence.

(f) I also considered the administrative measures taken and the process undertaken; clearly, it had a deterrent effect on you. Despite that, it is not the main factor that I have to consider in determining the sentence. Counselling and probation was given to you in relation to the incident for which you are before this Court. The evidence disclosed that you respected that supervision essentially every month and you were successful. It changed something in you, in your habit and, clearly, it tells the Court that you took the incidents seriously.

(g) There is also the fact that, further to this incident, you decided to reorganize your life to the point that you now have a common-law wife and a child resulting in a huge change of attitude. It tells the Court that you took this warning seriously and you decided to engage another perspective in life.

(h) There is also the fact that there is nothing on your conduct sheet; there is no annotation on a conduct sheet regarding the commission of an offence, of any offence similar or different in relation to the Code of Service Discipline.

(i) I also understand that you continue to have the support of your chain of command. Despite your personal problems, they find that you are performing well in terms of a professional working relationship and the evidence put by your counsel before the Court clearly stated that, in a working environment, as a soldier, you show respect and professionalism in performing your duty.

[14] Drug-related offences, before courts martial, usually call for serious consideration regarding incarceration. As you heard, the safety of others, your own safety during operations, exercises and such other things like this is a huge consideration. If you are under the influence of drugs while performing your duty or

you invite, by your behaviour, others to do so, you are endangering the life of others as well as your own life, so it is not merely a consideration of frivolous indulgence, it is also a matter of ensuring that people are safe and perform well in protecting the safety of others.

[15] So, I had to give serious consideration to the matter of incarceration. I would say that, in the context of an attempt and also thinking about other factors such as the nature of the offence, the objectives and principles on sentencing, as well as the mitigating and aggravating factors that I have just mentioned, I do not see any benefit in the circumstances to impose incarceration in this matter. I had the opportunity to read the decision of *Morgan* where I was the judge at that time, also the *Humphrey* decision I mentioned earlier which dealt with the same type of drug, but I also read the *Wright* decision. All those decisions were issued by courts martial in 2012. I would distinguish *Wright* from the present case in the sense that the nature of the offence itself was not considered as an attempt at the time, but rather as producing a substance. The *Wright* case also involved other offences where, the presiding military judge had to give serious consideration to the effect of the type of drug used but also to the set of facts that led the offender at the time to do what he did. At the time, items were seized in that matter, the investigation revealed that a small organized laboratory had been set up which is different from the circumstances of this case, so I do not find application for *Wright*. And, it supports my conclusion that incarceration is not warranted in the circumstances of this case. From my perspective, incarceration is not appropriate in the circumstances of this case not only because of these decisions, but also, from my perspective, it makes it a matter that is not of last resort, as indicated by the Supreme Court of Canada and Court Martial Appeal Court decisions.

[16] The Court finds the suggestion made by counsel reasonable in the circumstances of this case and will accept a combination of a severe reprimand and a fine as representing the minimum sentence to be imposed in this case. I also gave consideration to the issuance of an order prohibiting Corporal Pfahl to possess weapons pursuant to section 147.1 of the *National Defence Act*. From my perspective, the circumstances of the commission of the offence and from what has been disclosed as a matter of evidence since the commission of this offence doesn't bring me to conclude in any way that it is desirable to issue such order. As mentioned by your counsel, there is no relation to any organized crime, there is no act of violence involved in the commission of the offence and there is no indication that a weapon has played any role in the circumstances of this case, so manipulation of a weapon is not a concern for the Court and both counsel agreed on that.

[17] Corporal Pfahl, I understand that you still face some uncertainties about your career; however, what has been shown to me today is that no matter what happens to you, released or not from the Canadian Forces, you proved to yourself that when faced with personal issues, you still possess the ability to do something good. Despite what the future may hold for you in terms of the decision of the Canadian Forces authorities over your career in the Forces, I believe you have the strength and will to move

forward. That is why I accepted this recommended sentence. I wish you luck in your efforts to change trade which demonstrates, again, your will to continue with the Forces.

FOR THESE REASONS, THE COURT:

[18] **SENTENCES** you to a severe reprimand and a fine in the amount of $2,000. The fine shall be paid in five monthly instalments of $400 each, starting on 1 January 2015. If, for any reasons, you are released prior to the time the fine is paid in full, then the remaining amount shall be paid prior to your release.

Counsel:

The Director of Military Prosecutions as represented by Major J.E. Carrier

Major C.E. Thomas, Defence Counsel Services, Counsel for Corporal F.P. Pfahl