COURT MARTIAL

Citation: *R. v. McKenna*, 2003 CM 490

Date: 20031218

Docket: S200349

Standing Court Martial

Jericho Garrison, Vancouver

Vancouver, British Columbia, Canada

Between:

Her Majesty the Queen

- and –

Able Seaman R.E. McKenna, Offender

Before: Lieutenant-Colonel J.M. Dutil, M.J.

SENTENCE

(Orally)

[1] The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military,

however, the punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances.

[2] In determining sentence, the court has considered the circumstances surrounding the commission of the offence as revealed in the statement of circumstances, the mitigating and aggravating evidence in mitigation including the representations made by counsel and also the applicable principles of sentencing. Principles to be used in considering what is an appropriate sentence relate to the following: first; protection of the public, and, of course the public includes the Canadian Forces; secondly, the punishment of the offender; thirdly, the deterrent effect of the punishment, not only on the offender but also upon others who might be tempted to commit such offences; and fourthly, the reformation and rehabilitation of the offender.

[3] The prime principle is the protection of the public and the court must determine if that protection would best be achieved by deterrence, rehabilitation or punishment. How much emphasis will be put on one or more of these principles will vary depending on the case and its circumstances. In some cases the dominant principle if not the only principle, will be deterrence, either general or specific or both. In other cases the emphasis will be put on the offender's rehabilitation and reformation. In a case such as this one, in its particular circumstances where we are dealing with primary military good order and discipline, the court believes that the emphasis should be put on general and specific deterrence as well as punishment, but also the court also considers that the sentence must be proportionate to the gravity of the offence.

[4] In arriving in what the court considers a fair and appropriate sentence the court has considered the following factors: first, the objective gravity of the offence. The maximum punishment for an offence under section 97 of the *National Defence Act* is imprisonment for less than two years although when the offender is a non-commissioned member who is not on active service or on duty, who has not been warned for duty, as it is the case here because the offender was on leave when he committed the offence, no punishment of imprisonment or detention for a period in excess of 90 days may be imposed.

[5] Second, the court has considered your conduct sheet. It reveals a similar offence committed in September of 2001 for which you were sentenced by a standing court martial on 4 April 2002, that is less than two years ago, to a reprimand and a fine in the amount of $1250. If one considers your date of enrolment; that is 5 January 2000, this is your second appearance before a service tribunal in less than two years. This is totally unacceptable and it demonstrates either your lack of understanding or accepting military discipline.

[6] Thirdly, the fact that you spent four days in pre-trial custody as a result leading to the charge before this court. There is a generally accepted rule of thumb, though it is one that may be departed from for cause, that time spent in jail awaiting trial should be taken into account as

equivalent to two times that length. The court will, therefore, count this period to equal eight days of incarceration for the purposes of sentencing.

[7] The court has also considered the particular context of this case as revealed by the overwhelming evidence before the court as revealed by the statement of circumstances. This is certainly not a case where the offender could be referred to as a quiet drunk. To the contrary, not only were you unfit for duty, your conduct was absolutely disgraceful. While you were drunk and being detained at the military police section and even at the base hospital, your behaviour was completely irrational. Not only were you aggressive, very aggressive but you repeatedly used profanities and insulted everyone around you at the time, whether they were from the military police or from the medical staff.

[8] Fifth, the court has considered the fact that you, Able Seaman McKenna acknowledge responsibility for your actions by pleading guilty before this court and this is very important in this case because this court considers this admission of guilt as an acknowledgement of your misconduct and this admission of guilt must be assessed in light of your behaviour of 15 December 2002 once you were sober again, where you offered apologies to the military police and helped to clean your own mess on your own initiative.

[9] Sixth, the court has considered your rank, your age as well as your financial situation as revealed by the evidence before the court.

[10] Seventh, the court has considered the following: based on the evidence before this court, especially the testimony of Ms Annie Boivin who was accepted by this court as an expert in the field of clinical psychology as it relates to alcohol problems and personality disorders, I am prepared to accept that you suffered at the time of the offence and continue to this date and for the rest of your life, to suffer from a personality disorder not particularly specified with two clusters; one referred to as anti-social personalities and the other with paranoid threats. In addition you have been diagnosed with alcohol dependency. Counsel before the court referred to the combination of these problems or attributes as being volatile. I could not agree more. This explains, to some extent, your behaviour on 13 December 2003, however it does not excuse it.

[11] The fact that you did not know that you suffered from these disorders last December or even when you committed your previous related offence mitigates only in part your actions on 13 December 2002. The court totally disagrees with your counsel to the effect that you do not have a discipline problem because you did not know that you had a personality disorder and an alcohol dependency problem. What you knew is the following: you knew from your last encounter with the military justice system that if you got drunk within the meaning of the Act, you would face consequences. Nobody forced you to drink and your previous disciplinary problem related to drunkenness should have taught you a lesson, obviously it did not.

[12] And finally, the court has considered the fact that this incident occurred a year ago.

[13] Able Seaman McKenna, if you want to have a successful career in the Canadian Forces you will have to control not only your alcohol problem but your temper and your aggressiveness, as explained by your therapist. Aggressive and abusive language and improper behaviour towards superior officers or colleagues are not in order and they impact seriously on military discipline, even when you are drunk because they tend to be disgraceful. This cannot be tolerated. If you get the message this court is sending you today, and take upon yourself to stay out of trouble, using the tools that are provided to you by your therapist, you may have a chance to pursue a career in the Canadian Forces. I sincerely hope that you realize that this may be your last chance otherwise I sincerely invite you to consider your own future in the Canadian Forces and reflect on whether or not it is truly your place.

[14] At this stage of your career and after considering your very recent previously related conviction, a sentence that would be composed of a reprimand and a significant fine would not serve the interest of justice and military discipline, especially at your rank level and experience. The court believes that you need to go back to the basics of military discipline and the court is disposed to give you that second chance. Considering that incarceration should be viewed as a punishment of last resort, this court believes that given the circumstances of this case, there is no punishment or combination of punishments that can be a fair and just sentence short of the punishment of detention.

[15] Having accepted and recorded your plea of guilty to the first charge, the court finds you now guilty of that charge. Before your four days spent in pre-trial custody, this court would have sentenced you to fourteen days detention. The court has already stated that it will give you a credit of eight days. In consequence, the court sentences you to detention for a period of six days. This sentence is pronounced at 1853 hours on the 18th day of December 2003.

Counsel:

Lieutenant Commander C.J. Deschênes, Regional Military Prosecutions Atlantic, Counsel for Her Majesty the Queen

Major A. Appolloni, Directorate of Defence Counsel Services, Counsel for Able Seaman R.E. McKenna