



COURT MARTIAL

Citation: *R. v. Fischl*, 2020 CM 2007

Date: 20200708

Docket: 202021

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Private C.S. Fischl, Offender

Before: Commander S.M. Sukstorf, M.J.

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Today Private Fischl pleaded guilty to one charge contrary to section 90 of the *National Defence Act (NDA)*; that is to say, absented himself without leave. Having accepted and recorded your plea of guilty with respect to the charge, the Court must now determine and pass sentence on the charge. The charge sheet reads as follows:

“First Charge

ABSENTED HIMSELF WITHOUT LEAVE

Section 90 *NDA*

Particulars: In that he, on or about 27 October 2019, at 4th Canadian Division Support Base Petawawa, Ontario, without authority was absent from a fire piquet shift.”

[2] The Statement of Circumstances filed in Court reads as follows:

“STATEMENT OF CIRCUMSTANCES

1. At all relevant times, Private Fischl was a member of the Canadian Armed Forces, Reserve Force. He was a member of 33 Combat Engineer Regiment, based in Ottawa, Ontario. Private Fischl was a Combat Engineer by trade.

2. On the weekend of 25-27 October 2019, 33 Combat Engineer Regiment conducted Exercise DETONATING BEAVER in the training area at 4th Canadian Division Support Base Petawawa, Ontario. Private Fischl was on Class A service, and attended the exercise.

3. An enemy force was organized for the exercise, under the command of Warrant Officer Lee. Private Fischl was placed into a section with Corporal Sauve, Private Bayomock and other soldiers. Corporal Marks was the Section Commander.

4. On the evening of 26 October 2019, the enemy force moved into a hide for the night. Corporal Sauve was directed to create a fire piquet shift list for the section. Corporal Sauve did so, and he briefed the entire section, as a group, on the timings and rotation. Private Bayomock and Private Fischl were assigned the shift from approximately 0345 hrs to 0500 hrs on the morning of 27 October 2019.

5. Private Bayomock came on shift that morning. It was raining. She could not immediately find Private Fischl. After asking her Section Commander what to do, she found Private Fischl and woke him up. She gave him ten minutes to get ready. After that period Private Bayomock asked Private Fischl if he was coming to attend his shift. Private Fischl replied that he was not coming for his shift. Private Bayomock completed the shift on her own. Private Fischl later told his chain of command that he was wet from the rain and did not feel capable of doing the fire piquet shift. He also stated that because of the rain, he felt there was no risk of fire.”

Joint submission

[3] In a joint submission, the prosecution and defence counsel recommend that the Court impose a sentence of a fine in the amount of \$200. In *R. v. Anthony-Cook*, 2016 SCC 43, the Supreme Court of Canada clarified that a trial judge must impose the sentence proposed in a joint submission “unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest.” By entering into a joint submission, the constitutional right to be presumed innocent is

given up and this should never be done lightly. In fact, by virtue of the oath taken by all service members, this right is one that we all stand to protect.

[4] Thus, in exchange for making a plea, the accused must be assured of a high level of certainty that the Court will accept the joint submission. The prosecution, who jointly proposed the sentence, will have been in contact with the chain of command as well as the victims, and is aware of the needs of the military and the surrounding community and is responsible for representing those interests.

[5] The defence counsel, however, acts exclusively in the accused's best interests, including ensuring that the accused's plea is a voluntary and informed choice, and unequivocally acknowledges his guilt. As members of the legal profession, defence and prosecution are both accountable to their respective law societies and the Court relies heavily on their professionalism, honesty, judgement, as well as their duty to the Court.

Evidence

[6] In this case, the prosecutor read the Statement of Circumstances and provided all those documents required under the *Queen's Regulations and Orders for the Canadian Forces*. The Statement of Circumstances was introduced on consent to inform the Court of the context of the incident that led to the charge. The Court was also provided with an Agreed Statement of Facts that provided the comments from the Commanding Officer (CO) of 33 Combat Engineer Regiment, as well as those facts relevant to the offender. Further, the Court benefitted from counsel's submissions to support their joint submission on sentence where they highlighted additional relevant facts and considerations.

The offender

[7] Private Fischl, the offender, is twenty-three years old. He enrolled in the Canadian Armed Forces (CAF) in March 2018 and thus far has served his country for just over two years. He is currently serving as a member of the reserve force and is a member of the 33 Combat Engineer Regiment. Aside from the incident before the Court, he has no conduct sheet or criminal record. In his civilian capacity, he recently completed a degree in biochemistry from Carleton University. He is returning to school in September 2020 to study computer engineering; however, this summer, he is employed at a hospital in Ottawa as a bioinformatician engaged in testing programmes for finding cancer genes.

[8] As the Court explained to the offender, the prosecution is required to reach out to the unit for a unit impact statement and/or a victim impact statement. In this particular case, that was done and the unit's comments are included in the Agreed Statement of Facts. In describing the impact of the offence on 33 Combat Engineer Regiment, the CO, Lieutenant-Colonel Maloney, submitted the following:

“a. A fire piquet is employed and required every time troops are in the field, whether administratively or tactically, regardless of the use of motors, generators, lights or heat sources. Generally, the fire picket’s primary function is to ensure the safety of personnel during quiet hours, ensuring the safe operation of heat and power sources and any other situation that threatens safety. For example, personnel smoking in their beds, vehicle or motor exhaust not being vented properly, wildlife such as bears, etc.”

[9] Further, the CO wrote:

“b. Although this particular event did not result in a safety related incident, failure to acknowledge an order and report for duty has a very serious effect on morale. Armed forces members are expected to obey lawful orders that may be inconvenient or, ultimately, put lives at risk in order to accomplish the mission. The rest of the junior members of the unit will invariably look at this incident as an example of what not to do, and some will no doubt look at it as the limit on what they can get away with. This behaviour is unacceptable in the sense of carrying out military orders. This behaviour is also counter to a sense of camaraderie where everyone pulls their weight and has each other’s back.”

The purposes, objectives and principles of sentencing

[10] The fundamental purposes of sentencing in a court martial are to promote the operational effectiveness of the CAF by contributing to the maintenance of discipline, efficiency and morale, and to contribute to respect for the law and maintenance of a just, peaceful and safe society. These fundamental purposes are achieved by imposing sanctions that have one or more objectives that are actually delineated in the *NDA* at subsection 203.1(2).

[11] The prosecution has emphasized that in negotiations, he and defence counsel closely considered the objectives, and on the facts of this case, he submitted that the objectives considered most important are general and specific deterrence, as well as denunciation. Particularly, given the age of the offender, specific deterrence is very important, whether he intends to serve in the CAF as a reservist in the future and notwithstanding that, it is also important in any role he will fulfil in a civilian capacity. Self-discipline is a fundamental hallmark of professionalism and it is imperative that we all understand what is acceptable and what is not.

Accounting for relevant aggravating or mitigating circumstances

[12] Also under the *NDA*, in imposing a sentence the court must increase or reduce a sentence to account for any aggravating and mitigating circumstances relevant to the offence or the offender.

Aggravating factors

[13] After hearing the submissions of counsel, the Court highlights two aggravating factors:

- (a) Failure of personal discipline. You lacked personal discipline when you chose to stay comfortable in your sleeping bag and out of the rain on a cold October night, while knowingly leaving your fire piquet partner to do the duty alone. As the prosecutor indicated, you made a conscious choice to put your own personal comfort ahead of your duty. It was a poor decision on your part. There are times during any career when we are called upon to do disagreeable tasks. All soldiers must be able to pull their weight and we all need to be able to rely upon one another;
- (b) And, most importantly, your failure to show up for duty directly impacted your fire piquet partner, who was left standing by herself in the rain performing the duty. Fortunately, she was responsible and understood that someone needed to be there and there were no adverse repercussions.

Mitigating factors

[14] However, as counsel pointed out, there are several mitigating factors that must be highlighted:

- (a) Guilty plea. Private Fischl's plea of guilty for the offence as described in the Statement of Circumstances must be given its full weight. He came forward almost immediately to take responsibility for his conduct. When the charges were preferred, he instructed his counsel to proceed with a guilty plea to resolve this matter as quickly as possible. The charge was signed by the prosecutor on 20 May 2020, negotiations ensued and the matter was scheduled on 25 June, 2020 and it is now 8 July 2020;
- (b) His guilty plea has saved the Court, counsel and the unit supporting the Court considerable time;
- (c) First time offender. No conduct sheet or previous criminal record. This is the first disciplinary hearing of any type for him;
- (d) Potential for rehabilitation. Notwithstanding the offender's lack of experience, the fact that he came forward quickly to account for his lack of judgement is promising. It is clear that he has strong potential for rehabilitation.

Parity

[15] In terms of parity, the prosecution situated your case within the case law with respect to its level of seriousness. The Court does not have any concerns regarding the recommendation that was put forward. The joint submission sits within an acceptable range for this type of punishment that would be awarded.

Conclusion

[16] As the Court often expresses to people who come before it after having exercised poor judgement: we all make really bad choices at one point in our lives. Please do not let this shape who you are in the future, other than having learned a lesson and to avoid making similar mistakes in the future.

[17] The Court hopes that before you finalize your release, you speak with your chain of command and also do some self-reflection on whether or not you truly want to release from the CAF.

[18] After considering counsel's submissions in their entirety and all the evidence before the Court, I must ask myself whether the proposed sentence would, if viewed by the reasonable and informed CAF member, as well as the public at large, be viewed as a breakdown in the proper functioning of the military justice system. In other words, would the acceptance of this sentence cause the general public to lose confidence in the military justice system?

[19] Considering all the factors, the circumstances of the offence, the consequence of the finding, the sentence and gravity, the Court is indeed satisfied that counsel have discharged their obligation in making the joint submission. The recommended sentence is in the public interest and does not bring the administration of justice into disrepute.

FOR THESE REASONS, THE COURT:

[20] **FINDS** Private Fischl guilty of the first and only charge on the charge sheet for an offence contrary to section 90 of the *NDA*.

[21] **SENTENCES** Private Fischl to a fine in the amount of \$200, payable forthwith.

Counsel:

The Director of Military Prosecutions as represented by Major G.J. Moorehead

Captain M. Melbourne, Defence Counsel Services, Counsel for Private C.S. Fischl