COURT MARTIAL

Citation: *R v Ferguson*, 2011 CM 3008

Date: 20110923
Docket: 201139

Standing Court Martial

Halifax Courtroom
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Master Warrant Officer P.V. Ferguson, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Master Warrant Officer Ferguson, having accepted and recorded a plea of guilty in respect of the first charge on the charge sheet, the court now finds you guilty of this charge. Considering that the second charge is alternative to the first charge, then in accordance with subparagraph 112.05(8)(a) of the *Queen's Regulations and Orders for the Canadian Forces* (*QR&O*), the court directs that the proceedings be stayed on the second charge.

[2] It is now my duty as the military judge who is presiding at this Standing Court Martial to determine the sentence.

[3] The military justice system constitutes the ultimate means to enforce discipline in the Canadian Forces which is a fundamental element of the military activity. The purpose of this system is to prevent misconduct or in a more positive way, see the promotion of good conduct. It is through discipline that an armed force ensures that its members will accomplish in a trusting reliable manner successful missions. It also en-

sures that public order is maintained and that those who are 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[1]. 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.

[5] 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 fine in the amount of $900 in order to meet the justice requirements. Although this court is not bound by this joint recommendation, it is generally accepted that the sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons mean where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute, or be contrary to the public interest.[2]

[6] Imposing a sentence is the most difficult task for a judge. As the Supreme Court of Canada recognized in *Généreux,*[3] in order "to maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently."[4] It emphasized that, in the particular context of military justice, "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."[5] However, the law does not allow a military court to impose a sentence that would be beyond what is required in the circumstances of a case. In other words, any sentence imposed by a court must be adapted to the individual offender and constitute the minimum necessary intervention, since moderation is the bedrock principle of the modern theory of sentencing in Canada.

[7] The fundamental purpose of sentencing in a court martial is to ensure respect for 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 offences;

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[1] *R* v *Généreux* [1992] 1 SCR 259 at 293.
[2] *R* v *Taylor* 2008 CMAC 1 at para 21.
[3] *Supra note 1*
[4] *Ibid.*
[5] *Ibid.*

d. to separate offenders from society, where necessary; and

e. to rehabilitate and reform offenders.

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

a. a sentence must be proportionate to the gravity of the offence;

b. a sentence must be proportionate to the responsibility and previous character of the offender;

c. a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

d. an offender 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 and the Supreme Court of Canada decisions; and,

e. 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] I came to the conclusion that in the circumstances of this case, sentencing should place the focus on the objectives of denunciation and general deterrence.

[10] Here, the court is dealing with a military offence about making the proper declaration in an official document. This type of offence is directly related to some Canadian Forces members' ethical obligations such as integrity, loyalty and honesty. For a soldier, particularly a senior non-commissioned member, being trustworthy and reliable at all times is more than essential for the accomplishment of any task or mission in an armed force, whatever is the function or the role you have to perform.

[11] In arriving at what the court considers a fair and appropriate sentence, the court has considered the following mitigating and aggravating factors:

a. The court considers as aggravating the objective seriousness of the offence. The offence you were charged with was laid in accordance with paragraph 125(a) of the *National Defence Act* for wilfully making a false statement in a document you signed and that was required for an official purpose, which is punishable by imprisonment for a term of less than three years or to less punishment.

b. Secondly the subjective seriousness of the offence; in that for the court it covers three aspects:

i. The first aggravating factor from a subjective perspective is the lack of integrity you disclosed by your actions. From somebody at your rank and with your extensive experience, you have been, in your military life, exposed to various situations that should have told you to do better. As a senior NCO, expectations are very high and when somebody like you does such a thing, disappointment is also very high;

ii. The second aggravating factor is the premeditation attached to those circumstances. You had some time to think about filling in the proper information but you decided not to do so. The offence you pleaded guilty to requires a specific intent to commit it. It is not a situation where you had few seconds to think about it. You had an opportunity to plan and to figure what was the most appropriate thing to do and you clearly failed in doing so;

iii. Third, you basically tried to avoid or escape your responsibilities. As a driver it is expected that any damage done to a vehicle be reported in a prompt and efficient manner to allow Canadian Forces authorities to manage the cars and to put on the road competent and responsible drivers.

[12] There are also mitigating factors that I consider:

a. First, there is your guilty plea. Through the facts presented to this court, the court must consider your guilty plea as a clear, genuine sign of remorse and that you are very sincere in your pursuit of staying a valid asset to the Canadian Forces and it also discloses the fact that you are taking full responsibility for what you did. Your cooperative attitude since you decided to disclose what really happened must also be considered as a serious mitigating factor, especially in regard of the fact that you made your own decision to declare what really happened;

b. The absence of a conduct sheet, so there is no indication of the commission of any similar offence, military offence or criminal offence in relation or not to what happened;

c. Your performance in your military service. Clearly, you deserve respect for what you did in your military career so far. Your records of service clearly reflect that and it is something that the court must consider. It does also explain why your chain of command is very supportive in these circumstances. Clearly, further to the incident, you kept the confidence

of your superiors in the chain of command, and they still believe in you as a leader in the Canadian Forces;

d. The fact that you had to face this court martial. I'm sure it has already had some deterring effect on you, but also on others;

e. The fact that it is an isolated incident, out of character from somebody like you. Essentially, as expressed by your counsel, it is a lapse of judgment where you misreported a situation and for which you self-corrected the facts.

f. The delay. By wishing to be tried by summary trial, you clearly indicated to your chain of command that you wanted this matter to be dealt with expeditiously, which clearly did not occur. It is a factor that the court must consider, especially when it is clear to the court that all actors involved in the handling of this file failed to do their duty, which is to act expeditiously when a charge is laid against a person subject to the Code of Service Discipline. They may say that you failed to fulfill your duty, but by the way this matter was brought to this court, Canadian Forces authorities clearly failed to fulfill their own duty by dealing improperly with this matter. Then, it is as important in the circumstances of this case that the court considers it as a mitigating factor.

[13] Also, if the court accepts the suggestion made by counsel, this punishment will remain on your conduct sheet unless you get a pardon for the criminal record you are getting today. Reality is that your conviction will carry out a consequence that is often overlooked, which is that you will now have a criminal record and it is not insignificant.

[14] In consequence, the court will accept the joint submission made by counsel to sentence you to a fine in the amount of $900, considering that it is not contrary to the public interest and will not bring the administration of justice into disrepute.

FOR THESE REASONS, THE COURT:

[15] **FINDS** you guilty of the first charge for an offence under paragraph 125(a) of the *National Defence Act*.

[16] **DIRECTS** that the proceedings be stayed on the second charge.

[17] **SENTENCES** you to a fine in the amount of $900. The fine is to be paid immediately.

Counsel:

Major P. Rawal, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Lieutenant-Colonel T. Sweet, Directorate of Defence Counsel Services
Counsel for Master Warrant Officer P.V. Ferguson