Citation: *R. v. ex-Corporal D.D. Beek,* 2007 CM 2013

Docket: 200532

STANDING COURT MARTIAL
CANADA
EDMONTON, ALBERTA
1 COMBAT ENGINEER REGIMENT

Date:26 July 2007

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

HER MAJESTY THE QUEEN
v.
EX-CORPORAL D.D. BEEK
(Offender)

SENTENCE
(Rendered verbally)

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[1] Mr Beek, you have been found guilty of six charges of trafficking controlled substances. 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 taken on the trial, the evidence heard and received during the sentencing phase of the proceedings and the submissions of counsel, both for the prosecution and for the defence.

[2] The principles of sentencing guide the court in the exercise of its discretion in determining a fit and proper sentence in an individual case. A 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. But in imposing sentence, the court takes account of the many factual manners 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.

[3] 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. 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.

[4] 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 offence and provides for a maximum punishment, and may be 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. 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.

[5] The facts of the offences were set out in my reasons for findings delivered on 4 May 2007 and I will not repeat what I said then.

[6] The prosecution submits that a fit sentence in this case is imprisonment for a period of 18 months. The prosecution also seeks a firearms prohibition order under section 147.1 of the *National Defence Act* for an unspecified period.

[7] Defence counsel on behalf of Mr Beek submits that a sentence of incarceration in the area of three to four months would be appropriate and argues that the carrying into effect of the punishment should be suspended pursuant to section 215 of the *National Defence Act*. As well, the defence submits that a firearms prohibition order is not called for in the circumstances of this case.

[8] The offender is presently 29 years of age and was aged 26 at the time of the offences. He had about four years of Reserve Force service before joining the Regular Force in February of 2001. He was released in April of 2005 on an unsatisfactory item and I infer that the conduct giving rise to the charges was at least a contributing factor to the decision to release. During his service he acquired one

conviction for a disciplinary infraction of conduct to the prejudice of good order and discipline for which he received a minor punishment of extra work and drill. Since his release he has fathered a daughter, to whom he is very attached, and recently married the mother. Since the start of this trial, many months ago, the offender became very seriously ill and continues to suffer serious medical problems to which I will refer below.

[9] In the case of *Ordinary Seaman Ennis* in Halifax in December of 2005, I referred to the following quote from Mr Justice Addy speaking for the Court Martial Appeal Court in the case of McEachern v. The Queen (1985), 24 C.C.C. (3d) 439:

> [Because] of the particularly important and perilous tasks which the military may, at any time, on short notice, be called upon to perform and because of the teamwork required in carrying out those tasks, which frequently involve the employment of highly technical and potentially dangerous instruments and weapons, there can be no doubt that military authorities are fully justified in attaching very great importance to the total elimination of the presence of and the use of any drugs in all military establishments or formations and aboard all naval vessels or aircraft. Their concern and interest in seeing that no member of the forces uses or distributes drugs and in ultimately eliminating its use may be more pressing than that of civilian authorities.

[10] In my view the observations of Justice Addy are as pertinent today as they were when they were made more than 20 years ago. That is why I stated in the case of Master Seaman Murley in Esquimalt that the starting point for a consideration of sentence at court martial in a case of drug trafficking is incarceration. I agree with the position of both counsel that in this case the circumstances of the offences and of the offender call for a sentence involving incarceration. The offences here involved more than one type of controlled drug on each of the three occasions that the undercover officer made purchases from the offender. The nature of the substances supports their characterization as hard drugs with, in the cases of cocaine and methamphetamine, highly addictive properties, and in the cases of all three substances, including Ecstasy, extremely harmful effects on the health of users.

[11] It is true that the quantities of drugs involved and the amounts of money paid by the undercover operator are not huge; $80 for the 15 June transaction; $100 for the 17 June transaction; and $200 for the 18 June transaction. But the pattern of conduct suggests to me that, at the time of these offences at least, the undercover operator was being cultivated by the offender as a regular customer for various kinds of illicit drugs.

[12] Although there is some evidence of a hearsay nature from the psychologist, Mr Block, that the offender was himself using drugs up to the time of his arrest, there is no suggestion in the evidence before me that the offender was trafficking merely to support his own use of illicit drugs. I therefore find that these transactions

were of a commercial nature at what I would call a "street trafficking" level.

[13] With respect to the appropriate length of sentence, in addition to the circumstances I have already mentioned, I have considered that the offences in this case were not committed on a military establishment, nor did they involve other members of the Canadian Forces in their commission, at least to the knowledge of the offender. As well, the offender spent some nine days in military custody in the MP guardhouse, when he failed to appear for the resumption of his trial by court martial, from the time he was arrested on a warrant issued by me until he was released on my order following a hearing.

[14] The defence submits that a sentence of incarceration should be suspended principally because of the present medical condition of the offender and the circumstances of actual incarceration in the military facility located in Edmonton, known as the Canadian Forces Service Prison and Detention Barracks. I do not accept the submission of the defence that the punishment of imprisonment should be suspended. I have heard extensive evidence as to the medical condition of the offender since he was admitted to hospital on an emergency basis at some time during the course of this trial and between adjourned dates. It is clear from the evidence of Dr Leong-Sit that the offender suffered a very severe and generalized organ failure for reasons that are not clear to the doctors. I am told, and I accept, that the offender was close to death. His progress in hospital was slow, but he was eventually discharged after several weeks. Since returning home, he has suffered from a lack of energy and is only able to carry out the normal functions of living for a few hours in each day. It appears that he spends his time at home attending to his young daughter, I infer that he is unable to earn an income as a result of his medical condition.

[15] I also heard extensive evidence, both documentary and viva voce, as to the facilities and the daily routine of the Service Detention Barracks. I accept the evidence of Major Gribble that the daily routine for both service prisoners and service detainees is of a highly regimented and disciplinary nature. I also accept his evidence that each inmate is assessed for medical or other needs immediately upon entering the institution and that the detention barracks authorities have ready access to medical attention for inmates as and when required. I find on the basis of the evidence of Major Gribble that the service detention facility is well equipped to deal with inmates with unusual medical needs such as those of the offender.

[16] As the Court Martial Appeal Court held in the case of *Dominie*, 2002, CMAC 8, at paragraph [5] and I quote:

> [5] Trafficking in crack cocaine on numerous occasions, even though it is non-commercial in nature, generally requires the imposition of actual imprisonment even for civilian offenders. In respect of military offenders, general deterrence requires that the military know that they will be imprisoned

> if they deal in crack cocaine on military bases. Suspended sentence simply is not available, except in the rare case of extremely mitigating circumstances.

[17] The material that was produced before me on the sentence hearing establishes that one of the substances trafficked by the offender, methamphetamine, is more dangerous to the user than crack-cocaine. On all the evidence, I do not find in this case the extremely mitigating circumstances that would justify the suspension of the punishment of incarceration. Although I do not accept the submission of the defence that the sentence of imprisonment should be suspended, I consider that the medical condition of the offender is such that the serving of a sentence involving incarceration will be more onerous for him than it would be for a person who was completely healthy. For this reason, I have reduced the length of sentence that I would otherwise have imposed.

[18] One further point needs to be dealt with, the offender through his counsel filed an application, exhibit M4-1, challenging the constitutional validity of section 139 of the *National Defence Act*; the scale of punishment section, on the ground of what was said to be a violation of the rights of the offender under sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*. By way of remedy, the written application seeks declarations as to the state of the law and seeks a stay of proceedings. In the course of his address on the issue of sentence, counsel for Mr Beek essentially re-framed the issue and submitted that if the court did not suspend the execution of any sentence of incarceration imposed upon the offender, then the punishment would be cruel and unusual, in violation of section 12 of the *Charter* or would result in an unfair trial contrary to section 11(d) of the *Charter*. In this respect, I was referred to several decisions of courts of appeal across Canada dealing with conditional sentences of imprisonment imposed for offences of drug trafficking. Counsel pointed out that the scheme of conditional sentencing contained in the *Criminal Code* at section 742 and following, does not apply in proceedings under the Code of Service Discipline contained in the *National Defence Act*. I do not find any merit in these submissions. The standard by which to measure whether a punishment is cruel or unusual is whether the punishment imposed is so grossly disproportionate or so excessive as to outrage standards of decency, see *R. v. Latimer*, [2001] 1 S.C.R. 3.

[19] In my view, and considering all the circumstances, both of the offences and of the offender, it cannot be said that a punishment of actual imprisonment in this case is grossly disproportionate, neither does the punishment of imprisonment result in an unfair trial. There is, therefore, no breach of the *Charter* rights of the offender. The fact that under the *National Defence Act* the offender cannot receive a conditional sentence of imprisonment from this court is simply irrelevant.

[20] I have considered whether it is desirable in the interest of the safety of any person to make a firearms prohibition order in this case. In my view, considering especially that no weapons or violence were a feature of the offences committed, it is

not necessary or desirable to make such an order and I make no such order.

[21] Stand up, Mr Beek. You are sentenced to imprisonment for a period of nine months. The sentence is passed at 1239 hours on 26 July 2007.

COMMANDER P.J. LAMONT, M.J.

Counsel:

Captain D.G. Curliss, Directorate of Military Prosecutions
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