Citation: *R. v. Ordinary Seaman M. Lee*, 2009 CM 4002

Docket: 200811

GENERAL COURT MARTIAL
CANADA
BRITISH COLUMBIA
CANADIAN FORCES BASE ESQUIMALT

Date: 15 January 2009

PRESIDING: LIEUTENANT-COLONEL J-G PERRON, M.J.

HER MAJESTY THE QUEEN
v.
ORDINARY SEAMAN M. LEE
(Accused)

SENTENCE
(Rendered orally)

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[1] Ordinary Seaman Lee, the General Court Martial has found you guilty of trafficking in cocaine by aiding, abetting, counselling or procuring Ordinary Seaman Ellis in the trafficking of cocaine after a complete trial. I must now impose a fit and just sentence.

[2] In determining the appropriate sentence the court has considered the circumstances surrounding the commission of this offence, the mitigating circumstances raised by your counsel, the aggravating circumstances raised by the prosecutor and the representations by the prosecution and by your defence counsel and also the applicable principles of sentencing..

[3] Those principles which are common to both courts martial and civilian criminal trials in Canada have been expressed in various ways. Generally, they are founded on the need to protect the public and the public, of course, includes the Canadian Forces. The primary principles are the principles of deterrence that includes specific deterrence in the sense of deterrent effect on you personally as well as general deterrence; that is deterrence for others who might be tempted to commit similar offences. The principles also include the principle of denunciation of the conduct and last but not least the principle of reformation and rehabilitation of the offender.

[4] The court must determine if protection of the public would best be served by deterrence, rehabilitation, denunciation, or a combination of those factors.

[5] The court is required, in imposing a sentence, to follow the directions set out in article 112.48 of the Queen's Regulations and Orders which obliges it in determining a sentence to take into account any indirect consequences of the finding or of the sentence and impose a sentence commensurate with the gravity of the offence and the previous character of the offender.

[6] The court has considered the guidance set out in sections 718 to 718.2 of the *Criminal Code of Canada*. The purposes and principles enunciated at these sections serve to denounce unlawful conduct, to deter the offender and other persons from committing offences, to separate the offender from society where necessary, to assist in rehabilitating offenders, to provide reparations for harm done to victims or to the community and to promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community.

[7] The court is also guided by the provisions of sections 130 and 139 of the *National Defence Act*, section 724 of the *Criminal Code of Canada* and subsections 5(1), 5(3) and 10(1) of the *Controlled Drugs and Substance Act* in its determination of the lawfully permissible sentence in this case. A sentence may be composed of more than one punishment.

[8] The court has given consideration to the fact that sentences of offenders who commit similar offences in similar circumstances should not be disproportionately different. The court must impose a sentence that should be the minimum necessary sentence to maintain discipline.

[9] The ultimate aim of sentencing is the restoration of discipline in the offender and in military society. Discipline is that quality that every CF member must have which allows him or her to put the interests of Canada and the interests of the Canadian Forces before personal interests. This is necessary because Canadian Forces members must willingly and promptly obey lawful orders that may have very devastating personal consequences such as injury and death.

[10] The prosecution suggests that the principles of denunciation and of general and specific deterrence are the prime factors that apply in this case. The prosecution submits that a sentence of imprisonment for a period of six months is the appropriate sentence in this case. Your defence counsel suggests a sentence of a severe reprimand and forfeiture of seniority. Your counsel has also suggested an alternative sentence of 14 days of detention to be suspended and a fine in the amount of $3,000 to be paid at a rate of $200 per month.

[11] The Parliament of Canada considers that trafficking in cocaine is an extremely serious offence since it has decided that the most severe punishment under Canadian law, life imprisonment, is the appropriate maximum sentence for this offence. Trafficking in cocaine is condemned by Canadian society because of the harm it causes to individuals and to Canadian society.

[12] You had joined the Canadian Forces only a few months before this offence was committed. Although it was not proven in this court martial, it is a widely known fact that the Canadian Forces drug policy is clearly taught to recruits. Every Canadian citizen knows that the trafficking in cocaine is a serious criminal offence. One does not need to be instructed on the contents of the Canadian Forces drug policy to know that one should stay away from drugs such as cocaine and especially that one should stay away from the traffickers of cocaine. You did not attempt to do that.

[13] In *R. v. Généreux* [1992] 1 S.C.R. 259, the Supreme Court of Canada stated that:

> The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. 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. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.

The court then quoted the comments from a previous Federal Court decision of Mackay v. Rippon [1978] 1 F.C. 233 (T.D.), at pages 235-236:

> Without a code of service discipline the armed forces could not discharge the function for which they were created. In all likelihood, those who join the armed forces do so in time of war from motives of patriotism and in time of peace against the eventuality of war. To function efficiently as a force there must be prompt obedience to all lawful orders of superiors, concern, support for and concerted action with their comrades and a reverence for and a pride in the traditions of the service. All members embark upon rigorous training to fit themselves physically and mentally for the fulfilment of the role they have chosen and paramount in that there must be rigid adherence to discipline.

> Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential *esprit de corps*, mutual respect and trust in comrades and the exigencies of the barrack room life style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. ... Similarly a citizen may leave his employment at any time and the only liability he may incur is for breach of contract but for a soldier to do so is the serious offence of absence with leave and if he does not intend to return the offence is desertion.

I would add that trafficking of cocaine as another example of a civilian offence being treated more seriously in the military.

[14] The Canadian Forces cannot tolerate the use of illegal drugs or the trafficking of illegal drugs and I will now quote a passage from the Court Martial Appeal Court decision in *R. v. Taylor*, 2008 CMAC 1 to illustrate this point :

> In my view the sentence under appeal is not demonstrably unfit. The statement by the Military Judge in his decision that the "...use of drugs and the trafficking of drugs are a direct threat to the operational efficiency of our forces and a threat to the security of our personnel and equipment" deserves the deference of this court. This opinion is consistent with previous authority of this court in *R. v. Dominie*, 2002 CMAC 8, where Ewaschuk, J.A. wrote:
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> > 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. This is not one of those rare cases.

I have reviewed the cases presented by the prosecution and by your defence counsel. Firstly, I find that the case of *R. v. Hoddinott*, a Standing Court Martial held in 2006, is so different in its facts that it is of no use to me in this case. In *Hoddinott*, the accused was found guilty of trafficking in marijuana. He had passed one joint to an undercover police officer while in his apartment in Halifax. It was described as social trafficking amongst friends and acquaintances. The offence was not committed on a defence establishment or in the presence of other military members. As stated by the presiding judge in *Hoddinott*, this fact scenario could not be compared to the trafficking in hard drugs such as cocaine, even in small quantities, that requires the most serious punishment such as imprisonment.(That is my translation of the French decision.) The mitigating factors present in *Hoddinott*, found at paragraph 13, of that

decision, are not present in our case except for the fact that the conduct sheet of Ordinary Seaman Lee also does not contain any drug related infraction. Defence counsel did not offer any comment on the cases presented by the prosecutor.

[15] The prosecutor has provided me with the chart that includes a review of numerous cases of trafficking tried by courts martial. I can only make limited use of this chart since it only provides me with a synopsis of each sentencing decision. It would be much preferable to ensure that a copy of the sentencing decision is included with this type of chart to allow the sentencing judge the opportunity to read the whole sentencing decision and to appreciate the exact mitigating and aggravating factors considered in each of these cases as well as the evidence presented to the court that was found to be relevant to the sentencing phase of the trial. Defence counsel has not objected to the this chart being presented to the court and I will extract from it the information that is relevant to the sentencing phase of this present trial.

[16] With this in mind, I have focussed my attention to the cases involving the trafficking in cocaine. The other cases involve the trafficking of other types of drugs and I do not find them to be as relevant as those concerning the trafficking in cocaine. The cases I have found relevant are: *Ex-Corporal Beek*, *Ex-Corporal Stevens*, *Private Taylor*, *Ex-Private Legresley*, *Ex-Ordinary Seaman Ennis* and *Master Seaman Dominie*. I was provided with the *Ennis* sentencing decision and the *Taylor* and *Dominie* Court Martial Appeal Court decisions.

[17] *Ex-Corporal Beek* was found guilty of six charges of trafficking in cocaine and methamphetamine and sentenced to nine months imprisonment. I must indicate that the Court Martial Appeal Court has quashed his conviction and ordered a new trial. Therefore, I will not consider this case in the present sentencing decision.

[18] *Ex-Corporal Stevens* was found guilty of four counts of trafficking in cocaine and methamphetamine and sentenced to 16 months imprisonment. He pled guilty. The trafficking would have been for commercial purposes. He was still involved in the drug world and was judged likely to reoffend.

[19] *Ex-Private Taylor* was found guilty of one count of trafficking in cocaine and one count of possession of marijuana and was sentenced to 40 days imprisonment and a fine. He had pled guilty and the court was presented with a joint submission of 40 days of detention and a fine. The court sentenced him to 40 days imprisonment and a fine. This sentence was upheld by the Court Martial Appeal Court.

[20] *Ex-Private Legresley* was found guilty of two counts of trafficking in cocaine and sentenced to 60 days imprisonment. No other information is provided on this case. *Ex-Ordinary Seaman Ennis* was found guilty of three counts of trafficking in cocaine and methamphetamine and sentenced to 12 months imprisonment. These

offences involved two different transactions and the transactions were deemed to be commercial because of the quantities of drugs involved in the transactions.

[21] *Master Seaman Dominie* was found guilty of one count of social trafficking in crack cocaine and of unlawful possession of stolen property and sentenced to eight months imprisonment.

[22] Therefore, these cases indicate a range of 40 days imprisonment to 16 months imprisonment. The number of charges, the exact facts of each case, the mitigating and aggravating factors of each case would thus have to be taken into account when attempting to compare each case with the present case. Alas, as I have already mentioned, I was not provided with the complete information for each of these cases.

[24] The Court Martial Appeal Court decisions in *Dominie* and *Taylor* provide me with guidance on sentencing an offender guilty of trafficking in cocaine. Imprisonment is the appropriate punishment unless extreme mitigating circumstances point to a suspension of the sentence.

[25] Ordinary Seaman Lee, you have been found guilty by the panel of the General Court Martial of aiding, abetting, counselling or procuring the offence of trafficking in cocaine on a military establishment. You have not been found guilty of being the principal offender. Nonetheless, by virtue of subsection 72(1), you are a party to and guilty of the offence of trafficking in cocaine.

[26]

> [A] sentencing judge "is bound by the express and implied factual implications of the jury's verdict": *R. v. Brown*, [1991] 2 S.C.R. 518, p. 523.... [And a] sentencing judge: "shall accept as proven all facts, express or implied, that are essential to jury's verdict of guilty" [this is taken from] *Criminal Code*, s. 724(2)(*a*), and must not accept as fact any evidence consistent only with a verdict rejected by the jury....

I have just quoted from paragraph 17 of *R. v. Ferguson* (2008) 228 *C.C.C.* (3d) 385.

[27] The credibility of witnesses was at the heart of this trial since the panel had to determine which version of the events they would believe, yours or that of the prosecution witnesses. The panel has decided to believe the testimony of the prosecution witnesses on the extent of your participation in the sale of cocaine by Ordinary Seaman Ellis. The panel believed that you participation was much more than what you indicated in your testimony.

[28] Master Corporal Janes was involved in an undercover operation targeting the trafficking of drugs at Nelles Block. He approached you and asked about cocaine

because you and Ordinary Seaman Ellis were on his list of persons of interest. You could have walked away from the whole situation by telling Master Corporal Janes you could not help him. You could have refrained from telling other people and especially Ordinary Seaman Ellis that Master Corporal Janes was looking to buy cocaine. Instead, you chose to become involved in the trafficking in cocaine amongst the most junior members of the Navy.

[29] You testified that Ordinary Seaman Ellis was not your friend. During your cross-examination, you initially testified that you had heard rumours that Ordinary Seaman Ellis was a trafficker of drugs but then you attempted to change this testimony by stating that you had heard that Ordinary Seaman Ellis was a dealer of sneakers. You testified that you asked Master Corporal Janes if he was a cop and if he would do a bump to get him off your back but then you also testified that you were not really suspicious if he was a cop. You explained that you had asked him if he was from Borden because you wanted to find out about other bases in the Canadian Forces but then you did not ask him about Gagetown when he replied he was from Gagetown and not from Borden. You testified that on 20 June 2007 at the Fleet Club, you had told Ordinary Seaman Ellis exactly the same thing you had told other people; specifically that Master Corporal Janes was looking for cocaine and, you testified that your reason to go speak to Ordinary Seaman Ellis was to discuss the purchase of Ordinary Seaman Wilde's truck by Ordinary Seaman Ellis.

[30] You said you did not know what Ordinary Seaman Ellis would do with the information but you also said you did not care. I gather from the panel's verdict that they did not believe your version of events and that they did not believe your explanations for your questions to Master Corporal Janes or your reasons for speaking with Ordinary Seaman Ellis. You aided the sale of cocaine within the military community on a defence establishment. You helped Ordinary Seaman Ellis find a purchaser of drugs. This was not a situation of social trafficking. Ordinary Seaman Ellis had never met Master Corporal Janes before you directed him to Master Corporal Janes. You had only known Master Corporal Janes for less than one week. Although the quantity of drugs that was sold, 0.9 grams, has not been qualified as large, small or normal by the evidence, the discussion was for a sale two grams. Notwithstanding the quantity that was sold, the purpose of the transaction was purely commercial. You assisted in the commercial transaction of cocaine.

[31] You have a conduct sheet that contains three charges of being absent without leave and they occurred on 13 June 2007, on 24 July 2007 and on 11 September 2008. I do note that the present offense occurred after the first offence on your conduct sheet. I do not consider these offences to have much impact on the present sentencing phase since they are totally unrelated to this charge although they do demonstrate that you have not yet mastered the concept of discipline.

[32] I consider as mitigating factors the following:

> Exhibit 9 provides this court with the description of a very good work performance during the period of three months, that is from 22 September to 20 December 2008. The writer of this letter of reference, a commander, concludes that you have demonstrated strong potential to becoming an excellent sailor. His comments on your performance and on your potential is the only evidence presented to this court pertaining to your performance and potential in your short career in the Canadian Forces. This court has no other description of your performance and potential since your enrolment in 2006. I will accept this exhibit, this letter of reference, for what it is; a description of a very good performance for a period of three months and, based on these three months, the evaluation of one senior officer of your potential to became an excellent sailor.
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> I agree with your counsel that you are not the principal offender and that there is no evidence that suggests you are a user of cocaine or that you would have been involved in drugs in any other way than this single offence.

[33] The fact that you did not plead guilty and were found guilty after a complete trial is not an aggravating factor. But as indicated by the prosecutor, the court cannot consider remorse as a mitigating factor since you did not plead guilty or otherwise express any remorse.

[34] Ordinary Seaman Lee, stand up. You have made your choices and I have seen nothing in this case that would make me believe that outside influences affected your capacity to make these choices. Nothing tells me that you were directed to go in a direction that you did not truly wish to take or that you could not change the course of events.

[35] I have not been provided with extreme mitigating circumstances during the sentencing phase of this General Court Martial. I have not been presented with any mitigating evidence other than one reference letter concerning your performance during the period of September to December 2008.

[36] I believe this sentence must focus primarily on the denunciation of the conduct of the offender and on general and specific deterrence. I mention specific deterrence because you do not realize the nature of your actions nor do you accept the consequences of your acts.

[37] This court was not provided with any compelling mitigating evidence. Your counsel emphasized that you are not the principal offender and that you are only accused of one offence of trafficking and that there is no evidence that you are a user of cocaine.

[38] The aggravating factors, specifically your willingness to assist in the trafficking in cocaine for commercial purposes within the military community on a defence establishment, lead me to believe that the court must impose a sentence that will provide a clear message to you and to others and assist you in taking responsibility for this offence.

[39] Ordinary Seaman Lee, the court sentences you to imprisonment for a period of five months. You may sit down.

[40] This sentence was passed at 0953 hours on 15 January 2009.

LIEUTENANT-COLONEL J-G PERRON, M.J.

Counsel:

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