

Citation: *R. v. Captain R.M. Clarke*, 2009 CM 2001

Docket: 200816

**GENERAL COURT MARTIAL
FORT FRONTENAC
KINGSTON
ONTARIO
CANADA**

Date: 6 January 2009

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

HER MAJESTY THE QUEEN

v.

**CAPTAIN R.M. CLARKE
(Offender)**

**SENTENCE
(Rendered Orally)**

[1] Captain Clarke, having accepted and recorded your pleas of guilty to three charges contrary to section 129 of the *National Defence Act*; that is, acts to the prejudice of good order and discipline, the court now finds you guilty of charge number two, number six, and number seven.

[2] 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 described in the Statement of Circumstances, Exhibit 8, the materials received during the mitigation phase, and the submissions of counsel, both for the prosecution and for the defence.

[3] The principles of sentencing guide the court in the exercise of its discretion in determining a fit and proper sentence in an individual case. The 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. Nevertheless, in imposing sentence, the court takes account of the many factors 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.

[4] 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.

[5] As I explained to you when you tendered your pleas of guilty, section 139 of the *National Defence Act* prescribes the possible punishments that may be imposed at courts martial. Those possible punishments are limited by the provision of the law which creates the offence and provides for a maximum punishment. 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.

[6] The facts of these offences are set out in Exhibit 8, the Statement of Circumstances. In brief, the offender was the troop commander for a battery of field artillery engaged in combat operations in Afghanistan in the period of February to April of 2007. Sometime in February, the offender held a weapons training range during which he ordered the firing of twelve M72 rockets despite having been ordered, to the knowledge of his subordinates, that he was not to fire rockets as part of the exercise. Then on 5 March 2007, following what was called a "self-illumination mission," the offender ordered the sending of a Battle Damage Assessment Report misdescribing the observations, again in front of subordinates who were aware of the falsity of the report. Finally, on 20 April 2007, the offender, as part of a live-fire training exercise, ordered the firing of a high explosive artillery round instead of the much less dangerous smoke

rounds ordered by the forward observation officer. Fortunately, the HE round did not cause casualties or damage.

[7] In this case both counsel submit that the appropriate sentence is one of a severe reprimand and a fine in the amount of \$5,000. The sentence to be pronounced is, of course, a matter for the court, but where, as in this case, both parties agree on a recommended disposition, that recommendation carries great weight with the court. The courts of appeal across Canada, including the Court Martial Appeal Court, have held that the joint submission of counsel as to sentence should be accepted by the court unless the recommended sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[8] I consider that individual deterrence is the sentencing principle of overarching concern in the present case. Captain Clarke, you demonstrated a pattern of behaviour that can only be characterized as showing a serious lack of self-discipline. Ultimately, whether you succeed in disciplining yourself is up to you, but this court must do what it can to achieve that objective by the imposition of a fit sentence.

[9] I am mindful of several mitigating circumstances. Captain Clarke admitted his responsibility for these offences promptly to the police investigators and has pleaded guilty. He was transferred out of his regiment to a staff officer position where he has performed well. As well, I note that the charges have taken a long time to get to this stage at trial.

[10] On all the circumstances, I cannot say that the joint sentencing position of counsel is either contrary to the public interest or would bring the administration of justice into disrepute, and, accordingly, I accept the joint recommendation of counsel.

[11] Captain Clarke, you are sentenced to a severe reprimand and a fine in the amount of \$5,000 to be paid in monthly installments of \$500 each commencing 1 February 2009 and continuing for the following nine months. In the event you are released from the Canadian Forces for any reason before the fine is paid in full, the then outstanding unpaid balance is payable the day prior to your release.

COMMANDER P.J. LAMONT, M.J.

COUNSEL

Major A.W. Bolt, Regional Military Prosecutions Central

Counsel for Her Majesty The Queen

Lieutenant-Commander J.A. McMunagle, Directorate of Defence Counsel Services
Counsel for Captain R.M. Clarke