COURT MARTIAL

Citation: *R. v. Brown*, 2010 CM 2004

Date: 20100416
Docket: 200937

General Court Martial

CFB Gagetown Courtroom
Gagetown, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

Private M.B. Brown, Offender

Before: Commander P.J. Lamont, M.J.

REASONS FOR SENTENCE

[1] Private Brown, having accepted and recorded your pleas of guilty to the first charge, a charge of absenting yourself without leave; and the second charge, a charge of committing an act to the prejudice of good order and discipline, this court now finds you guilty on the first and second charges. In addition, and contrary to your pleas, you have been found guilty by the panel of this General Court Martial of the fourth charge, drunkenness; the fifth charge, assault upon Warrant Officer Hamel; and the sixth charge, a charge of using threatening language to a superior officer.

[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 disclosed by the evidence heard during the trial; the statement of circumstances, Exhibit 22; the evidence received in the course of 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. Nonetheless, 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.

[5] 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 a particular 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 reflect a wise blending of these goals tailored to the particular circumstances of the case.

[6] As I explained to you when you tendered your pleas of guilty to the first and second charges, 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. 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.

[7] In arriving at the sentence in this case, I have considered the direct and indirect consequences of the findings of guilt and the sentence I am about to impose.

> After a night of heavy drinking to the point of drunkenness, Private Brown returned to the barracks at CFB Gagetown shortly after midnight in the early morning of 7 January 2009. His absence from the barracks during the evening and his consumption of alcohol was in violation of the course policy directives on which he and his course-mates had been instructed.
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> He was met by his course warrant officer, Warrant Hamel, who was awaiting his return. He and his drinking companion, a course mate, were directed to change

clothing and report back to Warrant Hamel. While in his room, Private Brown got into a physical confrontation with another soldier. Warrant Hamel attended and went to assist Private Brown who was bleeding heavily, having gotten the worst of the confrontation. As he was helping him up, Private Brown grabbed Warrant Officer Hamel by the jacket and screamed abusive insults at him in these terms: "Fuck you, white nigger; fuck your army; fucking Frenchman; I am going to kill you; come on bastard." Private Brown attempted to kick Warrant Hamel twice in the genital area, but was restrained by other course-mates.

During the trial the defence called expert psychiatric evidence from Dr Joshi, a highly qualified practising psychiatrist. He has been treating Private Brown since a few weeks following the incidents giving rise to the charges. He diagnosed Private Brown with chronic paranoid schizophrenia and gave the opinion that Private Brown was suffering the symptoms of this condition at the time of the incidents. He was also of the opinion that, as a result of his mental disorder, Private Brown was incapable of appreciating the nature and quality of his actions or the consequences of his behaviour.

Dr Theriault, also a highly qualified psychiatrist, was called by the prosecution in rebuttal. On the basis of his examination of the case file, Dr Theriault did not disagree with the diagnosis reached by Dr Joshi, but he disagreed that the symptoms of this mental disorder explained the behaviour of Private Brown at the barracks. He considered that the better explanation was the simpler explanation, that the behaviour was a result of the excessive consumption of alcohol.

The defence argued that Private Brown was not criminally responsible on account of mental disorder, but by their findings of guilty on three charges the panel did not accept this defence.

[8] For the purposes of sentencing, it falls to me to make findings of fact on the evidence I have heard that are necessary in order to arrive at a fit sentence, but that are not inconsistent with the findings of the panel of this General Court Martial.

[9] I accept the evidence of the psychiatrists that the offender suffers from chronic paranoid schizophrenia, and, on the basis of the evidence of Dr Joshi, I find that he was suffering the symptoms of this condition to some degree at the time of the offences.

[10] I accept the submission of counsel on behalf of Private Brown that although he was not suffering these symptoms to such a degree as to negative criminal responsibility, nonetheless, the symptoms of this disease contributed, along with the excessive consumption of alcohol, to the behaviour giving rise to the charges.

[11] The prosecution seeks a sentence of detention for a period of 30 days and a fine in the amount of $2,000. As well, the prosecution seeks an order to provide DNA samples and a weapons prohibition order. The defence suggests that detention for a period

of 14 days is appropriate and argues that the carrying into effect of the punishment should be suspended.

[12] I have considered the aggravating and mitigating circumstances identified by counsel in the course of their addresses. I accept the submission of the prosecutor that these are objectively serious offences that go to the heart of discipline in a military organization. Assault on a military superior is a serious matter. On the other hand, there was a low level of actual violence in this particular assault. There was a pattern of disobedience to lawful authority displayed by the offender over the course of the evening, but on all the evidence I have heard, I am not persuaded that the use of the disgusting racial epithets in this case supports the conclusion that the offences were motivated by race hatred. I think it is much more likely that the foul and abusive language used by the offender was a manifestation of the symptoms of his mental disorder.

[13] The offender has a record of previous criminal convictions that was put before me. The most recent disposition dates back to 2004. It appears that the offender received a pardon for his previous offences, but with the approval of the Minister of Public Security, under the *Criminal Records Act*, the pardoned offences are before me. I accept the submission of the prosecutor that the record should be considered in arriving at sentence in this case. I note that the record discloses two previous convictions for assault; one such offence involving bodily harm, but this most recent of the two assault offences was dealt with in 1995 when the offender was aged 19 years.

[14] In the course of this sentencing proceeding the defence applied to proceed in camera with the public excluded under section 180 of the *National Defence Act*. The defence submitted that depending on the sentence imposed by this court, the pardon granted to the offender might or might not cease to have effect under section 7.2 of the *Criminal Records Act*, and if it continued to have effect, then the existence of the pardon should not be a matter of public knowledge. It was argued that for this reason it was necessary to exclude the members of the public for the proper administration of military justice under section 180(2)(b) of the *National Defence Act*. I dismissed the application.

[15] In my view, the effect of the sentence of this court on a pardon, previously granted in respect of other offences is not a factor to be considered in arriving at a fit sentence. I do not consider that the privacy concerns the offender may have with the public disclosure of his pardoned offences justifies the exclusion of the public from these proceedings. The disclosure of this information simply does not affect the proper administration of military justice.

[16] In my view, this is a proper case for an order that the offender provide DNA samples, and I so order under section 196.14 of the *National Defence Act*. Assault is a secondary designated offence as defined, and the circumstances of the present offence, together with the record of previous criminal convictions of the offender, lead me to the conclusion that the order is in the best interests of the administration of military justice.

[17] I have considered whether a weapons prohibition order under section 147.1 of the *National Defence Act* is desirable in the interests of safety, and I conclude that such an order is not required in this case.

[18] On all the circumstances of the offences and of the offender, I am satisfied that a sentence involving detention is fit, together with a fine. I have given consideration to whether the detention should be suspended. The Court Martial Appeal Court has recognized that in appropriate cases a sentence of incarceration may be suspended by the court in the interests of the rehabilitation of the offender. In my view, and bearing in mind the serious mental disorder that the offender suffers from and suffered from at the time of the offences and its likely contribution to the commission of some of the offences before me, this is one of those cases.

[19] You are sentenced to detention for a period of 14 days and a fine in the amount of $2,400. The fine is to be paid in monthly instalments of $200 each, commencing 15 May 2010 and continuing for the following 11 months. If you are released from the Canadian Forces for any reason before the fine is paid in full, the then outstanding unpaid balance is due and payable on the day prior to your release. Pursuant to section 215 of the *National Defence Act*, the carrying into effect of the punishment of detention is suspended.

COMMANDER P.J. LAMONT, M.J.

COUNSEL

Major J.J. Samson and Major A.T. Farris, Canadian Military Prosecution Service
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