Citation: *R. v. Master Corporal P.P. Billard*, 2007 CM 4019

Docket: 2006101

DISCIPLINARY COURT MARTIAL
CANADA
QUEBEC
ASTICOU CENTRE, GATINEAU

Date: 6 July 2007

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

HER MAJESTY THE QUEEN
v.
MASTER CORPORAL P.P. BILLARD
(Offender)

SENTENCE
(Rendered Orally)

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[1] Master Corporal Billard, having accepted and recorded your plea of guilty to charge No. 2, the court finds you guilty of this charge.

[2] The Statement of Circumstances to which you formally admitted the facts as conclusive evidence of your guilt, and the answers to the questions posed by the court, provide this court with the circumstances surrounding the commission of this offence.

[3] The principles of sentencing 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 the deterrent effect upon 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. The court has also considered the guidance set out in sections 718 to 718.2 of the *Criminal Code of Canada.*

[5] The court is required, in imposing a sentence, to follow the directions set out in article 112.48 of Queen's Regulations and Orders that oblige it in determining a sentence to take into account any indirect consequences of the finding or of the sentence and the previous character of the offender. The court must also impose a sentence that should be the minimum necessary sentence to maintain discipline.

[6] The prosecutor recommends that the principles of general and specific deterrence and of rehabilitation should be applied in the determination of the appropriate sentence. The prosecutor recommends a sentence of 10 to 21 days of detention. Defence counsel agrees that the principles of specific and general deterrence apply in this case, but he does not agree that rehabilitation is necessary. Your defence counsel points to your personnel evaluation reports and to the letters from your commanding officers as proof that you have rehabilitated yourself and that detention is not required to achieve this objective. Your counsel has suggested that a severe reprimand and a fine in an amount between $2,000 and $3,000, with a payment schedule of $250 per month, would be appropriate. In the alternative, he suggests that, should the court decide that detention is the appropriate punishment, any period of detention be suspended.

Mitigation

[7] I will first deal with the evidence in mitigation. Your plea of guilty is a tangible reflection of your acceptance of responsibility for your actions. You are a first-time offender and have no conduct sheet. Your personnel evaluation reports before and after the incident describe you as an excellent performer and indicate you have outstanding potential to progress in your trade. Your last PER recommends an immediate promotion to the rank of sergeant. The letters from your previous and present commanding officer are also highly positive and indicate you were to be promoted in January 2007, but this promotion has been delayed because of the charges before this court. Although your counsel has argued that your PERs demonstrate you have rehabilitated yourself, I do not interpret them in this fashion.

[8] Defence counsel has mentioned the delay of approximately 14 months should be taken into account as a mitigating factor. I have not been provided any evidence on the reason for the delay or of its effect on you. An offence of this nature should be dealt with as soon as possible to enhance the effects of the disciplinary proceedings and of the sentence on the offender, but as importantly on the military community. I do not find that the delay of approximately 13 months in this case can be considered a strong mitigating factor in sentencing.

Aggravation

[9] I will now deal with the aggravating factors of this case. One must remember that the ultimate aim of sentencing is the restoration of discipline in the offender and in military society. Discipline is the 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. Although discipline is a quality that is developed and encouraged by the Canadian Forces through instruction, training, and practice, it is ultimately an internal quality that is one of the fundamental prerequisites that ensure the operational efficiency of any armed force.

[10] The Supreme Court of Canada touched on the concept of discipline within the Armed Forces at paragraph 60 of its 1992 decision *R. v. Généreux*. This passage, although possibly misused in the past, is exactly on point today. The Supreme Court of Canada stated:

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. 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.

[11] I find it also very appropriate to quote an earlier decision from a previous Federal Court decision. In *MacKay v. Rippon*, [1978] 1 F.C. 233, at page 235, the Federal Court stated:

> 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 for 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 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.

[12] We are dealing with an offence that lies at the very heart of the concept of discipline and of our military justice system. This offence was committed in a theatre of operations in which combat and the threat from the enemy is an intricate part of daily life. The recent loss of six Canadian soldiers is a stark reminder of this fact. Discipline is one of the fundamental qualities that ensures mission success and the safety of our personnel and of our equipment. We are trained to perform our duties and are expected to execute those duties to the best of our abilities. We must also trust our comrades-in-arms to be up to the task to ensure mission success and ensure the safety of our troops.

[13] The Code of Service Discipline contains 19 offences that have imprisonment for life as a maximum punishment. Six of these offences, sections 73 to 78 of the *National Defence Act*, represent offences committed while in action, in the presence of the enemy, or relate to the security of our troops or of our operations. They represent some of the most serious offences under our Code of Service Discipline. The maximum punishment for the offence of neglect to the prejudice of good order and discipline is dismissal with disgrace from Her Majesty's service.

This punishment is the third most severe punishment in the scale of punishments found at section 139 of the *National Defence Act*.

[14] The particulars of this specific offence and the facts of the offence at hand pertain to your failure to follow orders while your unit was under attack. You displayed a total lack of discipline and a lack of respect for orders by remaining in bed, by refusing to don your helmet and your flak vest and by refusing to report to your assigned place of duty during the stand-to. Your role during a stand-to was to act as a stretcher-bearer and to be part of the reserve force. You were aware there was an increased threat to the Forward Operating Base and that the base was particularly vulnerable at that time because a large number of soldiers were absent from the base.

[15] The stand-to was initiated because the camp was attacked by two insurgents. The stand-to siren and small arms fire could be heard throughout the camp. A guard returned fire and a patrol was dispatched to find the attackers. The stand-to lasted approximately one hour to one and half hours. At the start of the stand-to, other members of your living area urged you to get out of bed and tried to make you react appropriately to the alarm.

[16] You tried to discourage a corporal from donning his fighting order by telling him "Where are you going and what for? You are a fucking flincher."

[17] I find your conduct reprehensible. It surely is not the conduct we expect of Canadian non-commissioned officers. Your duty is to follow orders and to ensure the welfare and discipline of your subordinates. You failed this duty miserably on 22 May 2006.

[18] Such conduct attacks the very core of our institution. Denunciation of such conduct and retribution are sentencing principles that apply to this type of offence and most particularly, this type of conduct by the offender. I find useful at this time to quote relevant passages from a key Supreme Court of Canada decision on these principles to help explain why these specific principles should apply in this case. In *R. v. M. (C.A.)*, (1996) 105 C.C.C. (3d) 327, Chief Justice Lamer wrote the following on the issue of retribution and denunciation in sentencing:

> [79] Retribution, as an objective of sentencing, represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender. In my view, retribution is integrally woven into the existing principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be "just and appropriate" under the circumstances. Indeed, it is my profound belief that retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of *criminal liability* and the imposition of *criminal sanctions*....
>
> [80] However, the meaning of retribution is deserving of some clarification. The legitimacy of retribution as a principle of sentencing has often

been questioned as a result of its unfortunate association with "vengeance" in common parlance ... But it should be clear from by foregoing discussion that retribution bears little relation to vengeance, and I attribute much of the criticism of retribution as a principle to this confusion. As both academic and judicial commentators have noted, vengeance has no role to play in a civilized system of sentencing ... Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the *moral culpability* of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and *nothing more*....

[81] Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution, requires that a judicial sentence properly reflect the moral blameworthiness of that particular *offender*. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's *conduct*. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined with our substantive criminal law.... The relevance of both retribution and denunciation as goals of sentencing underscores that our criminal justice system is not simply a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the offender must bear in committing an enumerated offence. Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code.*

Finally at paragraph 82:

[82] As a closing note to this discussion, it is important to stress that neither retribution nor denunciation alone provides an exhaustive justification for the imposition of criminal sanctions. Rather, in our system of justice, normative and utilitarian considerations operate in conjunction with one another to provide a coherent justification for criminal punishment.... Accordingly, the meaning of retribution must be considered in conjunction with other legitimate objectives of sentencing, which include (but are not limited to) deterrence, denunciation, rehabilitation, and the protection of society. Indeed, it is difficult to perfectly separate these interrelated principles. And as La Forest J. emphasised in *Lyons*, [another Supreme Court of Canada decision] the relative weight and importance of these multiple factors, will frequently vary depending on the nature of the crime and the circumstances of the offender. In the final analysis, the overarching duty of a sentencing judge is to draw upon all the legitimate principles of sentencing and determine a "just and appropriate" sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender.

[19] Master Corporal Billard, stand up. You had arrived at the Forward Operating Base on 12 December 2005. You had lived in that environment for approximately five months before the offence. I have not been provided with any evidence that would help me explain your actions on 22 May 2006. Although they appear out of character with your normal level of performance as described by your PER, they seem to demonstrate that you failed in an environment and in a situation that is the ultimate test for a soldier. I am talking about meeting the ultimate challenge, that of demonstrating one's discipline and one's fortitude on the battlefield. This egregious lack of self-discipline was compounded by your lack of leadership when you attempted to discourage a corporal from obeying the standing orders. You made conscious decisions throughout a stand-to that lasted over one hour with one objective in mind, the willful disobedience of a critical standing order while the camp was under a direct threat from the enemy.

[20] It is not important that we now know that no one was hurt and that the attack was over in a matter of minutes. One can safely infer that the standing orders' purpose was to ensure that everyone was accounted for, was dressed to ensure their protection, and that each person would play a role in defending the camp and in ensuring the safety of their comrades. You had a role to play as a stretcher-bearer or as a member of the defence force. You let your comrades down in a time of danger.

[21] I do not find that your monitoring of the radio has any bearing in this case. It is not up to you to decide which orders are applicable to you and when they are applicable. You, like any other soldier at that camp, had one important responsibility: obey the orders and react in a manner that will ensure the safety of your comrades and the success of the mission.

[22] I have reviewed the sentencing decision in the *Sergeant Goodland* Standing Court Martial and find significant differences with the case at hand. I have been provided much details pertaining to the operational situation at the time of the offence and about the level of threat that existed at the time of the offence and of the consequences of the failure to fulfill the duties assigned to you.

[23] The court believes this sentence must focus primarily on general deterrence, denunciation, and retribution. Your rehabilitation will also be assisted by the punishment I am about to impose. I would have considered a more severe sentence than what I am about to impose had it been proposed by the prosecution. Also, in the present case, the nature of your interaction with a corporal at the time of the offence makes your conduct more reprehensible than that of Sergeant Goodland.

[24] Master Corporal Billard, I sentence you to a period of detention of 21 days.

Lieutenant-Colonel J-G. Perron, MJ

Counsel:

Major A. Tamburro, Directorate of Military Prosecutions
Counsel for Her Majesty The Queen
Lieutenant-Commander J. McMunagle, Directorate of Defence Counsel Services
Counsel for Master Corporal Billard