COURT MARTIAL

Citation: *R. v. Semrau*, 2010 CM 4010

Date: 20101005
Docket: 200945

General Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Captain R.A. Semrau, Offender

Before: Lieutenant-Colonel J-G Perron, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Captain Semrau, the panel of the General Court Martial found you guilty of having behaved in a disgraceful manner. You were also charged with second degree murder, of attempt to commit murder using a firearm, and of negligent performance of a military duty, but the panel found you not guilty of these charges. I must now impose a just and appropriate sentence.

[2] Before I address the principles of sentencing that apply in this case, I must set out the facts that are necessary for the determination of the appropriate sentence. I must accept as proven all the facts, expressed or implied, that are essential to the panel's verdict of guilty[1] and I must not accept as fact any evidence consistent only with a verdict rejected by the jury. If the factual implications of the panel's verdict are ambiguous, I must come to an independent determination of the relevant facts. I may find any other relevant fact that was disclosed by evidence at the trial to be proven. I may only rely upon an aggravating fact if I am convinced of the existence of that fact beyond a rea-

[1] See art. 112.54 of *The Queen's Regulations and Orders for the Canadian Forces*.

sonable doubt. I must be persuaded on a balance of probabilities for any other relevant fact that I may wish to rely upon. I must find only those facts necessary to permit the proper sentence to be imposed in the case at hand.[2]

[3] One must keep in mind that I must sentence you only in respect of the offence for which you were convicted.[3] As I have already mentioned, the panel found you not guilty of second degree murder, of attempt to commit murder using a firearm, and of negligent performance of a military duty. I do not have to determine which essential elements of these offences the panel decided had not been proven beyond a reasonable doubt, nor need I determine what evidence they accepted and what evidence they chose not to accept in relation to these three charges. The law only requires me to focus on the facts that relate to the charge for which I must sentence you.

[4] You were found guilty of behaving in a disgraceful manner contrary to section 93 of the Code of Service Discipline, which is in the *National Defence Act* (*NDA*). The Code of Service Discipline promotes the need for good order, discipline, and high morale. The *Criminal Code* does not contain an offence similar to the one found at section 93 of the *National Defence Act*. The prosecution had to prove each of the essential elements of this offence beyond a reasonable doubt before the panel could find you guilty of this offence. The elements of that offence are:

a. your identity as the alleged offender;

b. the date and place of the commission of the offence;

c. that you had shot an unarmed and wounded unnamed male person while acting as the Commander of call sign 72A Operational Mentoring Liaison Team;

d. that such act constitutes disgraceful behaviour; and

e. your blameworthy state of mind at the time of the commission of the offence.

[5] You deployed to Afghanistan in 2008 as part of the Operational Mentor Liaison Team assigned to mentor the Afghan National Army (ANA). You were the commander of call sign 72A. This team was composed of four members divided into two fire teams. During the month of October 2008, you were involved in a clearing operation with the Afghan National Army in Helmand province in Afghanistan. You were mentoring the commander of an Afghan infantry company during that operation. On 19 October 2008, the lead element of that company encountered an enemy position. Attack helicopters were called in to suppress the enemy position. You and your fire team partner were located with Captain Shaffigullah, the ANA company commander, at the rear

[2] See *R. v. Ferguson*, 2008 SCC 6, at paras. 16 to 18.
[3] See *R. v. Larche*, 2006 SCC 56, at para. 1.

of the company when you first came upon the first insurgent who was lying on a path by a cornfield.

[6] The situation on the ground at the time seemed relatively calm although the potential for danger is omnipresent in such combat operations. After a brief examination of the insurgent, the ANA company commander moved to the position of the dead insurgent in the next cornfield. You also went to the location of the second insurgent and then you returned to the location of the first insurgent so that your fire team partner could photograph the insurgent for intelligence purposes. Once the photographs had been taken, you shot the insurgent.

[7] Your identity as the offender and the time and place of the offence were never in contention during this trial. It was evident the insurgent was unarmed and that you were the commander call sign 72A at the time of the offence. The nature and extent of the insurgent's wounds were described by numerous witnesses during the trial. Four witnesses testified he was alive when they observed him. I instructed the panel they had to be satisfied beyond a reasonable doubt that the unnamed male person was alive when you shot him, because the particulars of the charge allege that the unnamed male person was wounded. As I instructed the panel, a "wound" is defined as an injury to living tissue caused by a cut, blow, or other impact; thus one must be alive to be described as "wounded." Therefore, I conclude the panel was satisfied beyond a reasonable doubt that the insurgent was still alive at the time you shot him.

[8] When addressing your state of mind, I instructed the panel that the prosecution had to prove beyond a reasonable doubt that you intended to shoot the unarmed and wounded unnamed person. I take from the panel's verdict that they believed you intentionally shot the first insurgent. It does not really matter whether you shot the insurgent twice in quick succession—a "double-tap," as we are taught in our infantry training—or whether you only shot him once.

[9] As I explained to the panel, to behave in a disgraceful manner requires that the behaviour is shockingly unacceptable in the circumstances. "Shocking" is defined as causing indignation or disgust. Having considered all of the evidence on the roles and duties of the OMLT members, the conduct expected of CF members involved in operations in Afghanistan and the evidence pertaining to the circumstances surrounding the shooting of the insurgent, the panel decided that this behaviour was shockingly unacceptable in the circumstances.

[10] Why is shooting an unarmed and wounded person considered disgraceful? The code of conduct for CF personnel clearly states that we must offer assistance to wounded enemies that do not pose a threat to us. The code of conduct was taught to every OMLT member and was part of the soldier's card issued to every OMLT member. It was clear from the testimony of every witness that one cannot shoot an unarmed and wounded enemy. I conclude that shooting a wounded and unarmed person in the circumstances of the present case is considered disgraceful because it is so fundamentally contrary to our values, doctrine, and training that it is shockingly unacceptable.

[11] Having established the facts needed to determine the appropriate sentence, I will now examine the sentencing principles at play in the present case. As indicated by the Court Martial Appeal Court (CMAC), sentencing is a fundamentally subjective and individualized process where the trial judge has the advantage of having seen and heard all of the witnesses and it is one of the most difficult tasks confronting a trial judge.[4]

[12] The CMAC also clearly stated in *Tupper*[5] that the fundamental purposes and goals of sentencing as found in the *Criminal Code of Canada*[6] apply in the context of the military justice system and a military judge must consider those purposes and goals when determining a sentence. Section 718 of the *Criminal Code* provides that the fundamental purpose of sentencing is to contribute to "respect for the law and the maintenance of a just, peaceful and safe society" by imposing just sanctions that have one or more of the following objectives:

a. to denounce unlawful conduct;

b. to deter the offender and other persons from committing offences;

c. to separate offenders from society, where necessary;

d. to assist in rehabilitating offenders

e. to provide reparations for harm done to victims or to the community; and

f. to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

[13] The sentencing provisions of the *Criminal Code*, ss. 718 to 718.2, provide for an individualized sentencing process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender.[7] A sentence must also be similar to other sentences imposed in similar circumstances.[8] The principle of proportionality is at the heart of any sentencing.[9] The Supreme Court of Canada tells us at paragraph 42 of *Nasogaluak* that proportionality means a sentence must not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence. But a sentence is also a "form of judicial and social censure". A proportionate sentence may express, to some extent, society's shared values and concerns. As stated by Lamer C.J. in *R. v. M.(C.A.),* [1996] 1 S.C. R. 500 at paragraph 81:

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[4] *R. v. Tupper*, 2009 CMAC 5 at para. 13.
[5] *Ibid*, at para. 30.
[6] R.S., 1985, c. C-46.
[7] *R. v. Angelillo*, 2006 SCC 55 at para. 22.
[8] *R. v. L.M*., 2008 SCC 31 at para. 17.
[9] *R. v. Nasogaluak*., 2010 SCC 6 at para. 41

> 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*.

[14] Proportionality requires a balancing of two competing interest. As stated by the Supreme Court of Canada:

> Whatever the rationale for proportionality, however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.

[15] A judge must weigh the objectives of sentencing that reflect the specific circumstances of the case. It is up to the sentencing judge to decide which objective or objectives deserve the greatest weight. The importance given to mitigating or aggravating factors will move the sentence along the scale of appropriate sentences for similar offences. The wide discretion given sentencing judges may be constrained by general ranges of sentences for particular offences to encourage consistency in sentencing.[10]

[16] An offender should not be deprived of liberty if less restrictive sanctions other than imprisonment may be appropriate in the circumstances. This general rule of sentencing created by Canadian jurisprudence is now found in section 718.2 of the *Criminal Code*.[11] But the Court Martial Appeal Court also indicated that the particular context of military justice may, in appropriate circumstances, justify, and, at time, require a sentence which will promote military objectives.[12]

[17] But one must remember that the ultimate aim of sentencing in the military context is the restoration of discipline in the offender and in the military society. The court must impose a sentence that should be the minimum necessary sentence to maintain discipline.

[18] Discipline is at the very heart of every efficient and effect military force. Discipline is that quality that each 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. Discipline is described as a quality because ultimately, although it is something that is developed and encouraged by the Canadian Forces through instruction, training

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[10] *Ibid*. at paras. 43 and 44.
[11] *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 40.
[12] *Supra* note 4,at paras. 33 and 34.

and practice, it is an internal quality that is one of the fundamental prerequisites to operational efficiency in every armed force.

[19] The prosecution suggests that the following principles of sentencing apply in this case: general deterrence, denunciation and retribution. The prosecution has provided this court with eight cases in support of its submission that the minimum sentence in this matter is dismissal with disgrace from Her Majesty's service and imprisonment for a period of two years less a day. Your defence counsel asserts that a sentence of a reduction in rank and a severe reprimand would represent a just sentence in this case and would answer the need for general deterrence and denunciation.

[20] The prosecutor and your defence counsel argued that the sentence should not reflect public opinion but should send a message to the CF and to the Canadian public. While they are correct is saying so, no evidence was presented which would indicate whether public opinion is supportive of a harsh sentence or whether it is supportive of a lenient sentence. In our free and democratic society, any person may form an opinion on any subject and express this opinion freely, subject to certain limitations found in our law. A sentencing judge must execute his or her duty, not by wondering what the public might think of the sentence, but by applying the law to the facts of the case as presented to her or him and thus determine a sentence that is just and appropriate in the circumstances in accordance with the applicable principles of sentencing. This is the only way a sentencing judge may perform his or her duty of administering justice without fear or favour and in a fair, impartial and independent manner.

[21] Brigadier-General Thompson testified for the prosecution during the sentencing hearing. He was representing the chain of command. He was asked if you should be allowed to continue to serve following your conviction for disgraceful conduct for shooting a wounded and unarmed insurgent. He answered he could not comment specifically on you because he did not know you, but he felt the conduct in the particular circumstances warranted that the person be released from the CF because it was such a blow to the institution and it was required as a deterrent. He also expressed his opinion concerning the type of message the sentence must convey to the Canadian Forces and to the Canadian public. Brigadier-General Thompson stated that he does not know you personally and that his knowledge of the facts of this case are based on a briefing he received from the prosecutor immediately before testifying.

[22] Lieutenant-Colonel Cameron is your commanding officer (CO) and he testified in mitigation. Commanding officers are entrusted with the most important and influential appointment in the Canadian Forces. He knows you personally. It is his duty to know you.[13] The Commanding Officer is at the heart of the entire system of discipline.[14] Notwithstanding this conviction for behaving in a disgraceful manner, he testified he would welcome you in his battalion without reservation if you were permitted to remain in the Canadian Forces.

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[13] CDS Guidance to CO, Chap 1, 101.1
[14] *Ibid*, Chap 10, 1005.5

[23] It is my duty to determine the just and appropriate sentence in this case, and I will do so based on the facts of the case, the evidence presented during the sentencing phase and the applicable principles of sentencing, and not on the personal opinions of witnesses, whoever they may be.

[24] I will now examine the mitigating factors in this case. You do not have a conduct sheet; thus you are a first-time offender. While you are not considered a youthful offender, I do note that you were a very junior captain at the time of the offence. I have carefully reviewed Exhibits 56, 19 letters of reference; 57, a psychological assessment; 59, your Certificate of Service for the British Army; 60, letters from officers of the 2nd Battalion, The Parachute Regiment; and 61, documents from the CF Leadership and Recruit School. I have also considered the testimony of Private Villeneuve, Major Oberwarth and Lieutenant-Colonel Cameron.

[25] This evidence paints a clear picture. It portrays you as an individual who has been a positive influence in the lives of those people who have had the opportunity to know you. Private Villeneuve and Major Oberwarth both testified you were a leader who displayed courage in dangerous situations and who showed a high level of professionalism when mentoring the ANA. Major Oberwarth stated that you were the best mentor he had worked with in Afghanistan and he would gladly have you under his command in the future. Lieutenant-Colonel Cameron testified you are an asset to the CF and that members of his battalion look up to you. Your performance since your repatriation from Afghanistan has been outstanding. He stated this offending behaviour is totally out of character.

[26] During this court martial, every witness described you in a positive manner. Although you had only recently graduated from the infantry school, you were assigned to the OMLT because your superiors recognized your experience gained through your years with the Parachute Regiment of the British Army and your strong leadership potential. You gained the respect of your subordinates and of Captain Shaffigullah because you were a leader that cared for his subordinates and displayed battlefield qualities that inspired confidence and trust.

[27] I agree that this behaviour on 19 October 2008 is totally out of character for you. By all accounts, your conduct before and after this offence has been exemplary.

[28] You were arrested on 30 December 2008. You were in military custody for nine days from the time you were arrested by the Canadian Forces National Investigation Service in Afghanistan until you were released on 7 January 2009 by a military judge in Petawawa. Charges were laid on 31 December 2008 and a charge sheet was preferred by the Director of Military Prosecutions on 17 September 2009. Pre-trial motions were heard during the months of January and February 2010 and a pre-trial motion for unreasonable delay was dismissed in January 2010. Your trial by General Court Martial began on 24 March 2010. You were convicted on 19 July 2010. The psychiatric report found at Exhibit 57 states that you are a healthy individual who has experienced a certain amount of anxiety in the past year while waiting for this trial. It does not appear

this anxiety is anything other than the normal stress associated with any trial. While it is true you have waited approximately 21 months, from January 2009 until October 2010, for the conclusion of this trial, your defence counsel has not presented me with any evidence that would make me put much weight to this mitigating factor.

[29] You exercised your right to plead not guilty. You were found guilty by the panel of this General Court Martial at the end of a complete trial. This exercise of your right cannot be viewed in a negative manner and it cannot be considered as an aggravating factor. Canadian jurisprudence generally considers an early plea of guilty and cooperation with the police as tangible signs that the offender feels remorse for his or her actions and that he or she takes responsibility for his or her illegal actions and the harm done as a consequence of these actions. An accused that pleads guilty at the earliest opportunity lessens the strain on the judicial resources since witnesses do not have to testify and the costs associated with the judicial proceeding are thus reduced. Therefore, such cooperation with the police and an early plea of guilty will usually be considered as mitigating factors.

[30] An accused that pleads not guilty cannot hope to receive the same consideration from the judicial process. However, this does not mean that the sentence is increased because the accused has been found guilty after pleading not guilty; it only means that his or her sentence will not be affected by the mitigating factor of a plea of guilty.

[31] I have also considered the following aggravating factors. The prosecution argued that your deliberate act was an aggravating factor. Although the evidence indicates that the tactical situation at the location of the first insurgent was relatively calm at the time of the offence, you were still involved in a combat operation where you could fall under enemy fire at any time. Captain Shaffigullah was instructing his subordinates to continue with the advance and you had to stay with him to perform your role of mentor and to ensure the safety of your fire team.

[32] You then made a decision that will cast a shadow on you for the rest of your life. You intentionally shot the unarmed and wounded insurgent. You did not discuss your decision with your subordinate before you shot the insurgent, but you did inform them of the reasons for your decision after the offence. You made this decision within minutes of having arrived at that location under the conditions of battlefield stress I have just describe. Although the fact that you intentionally shot the wounded and unarmed insurgent is an aggravating factor, I find there was no premeditation on your part.

[33] The prosecutor stated that Canadian soldiers must treat the enemy *hors de combat* humanely and that such mistreatment represents a grave breach of the *Geneva Conventions*. He then mentioned you had not been convicted of a grave breach, but that he only wished to underline the seriousness of the offence. He also argued that ending the life of another is not permitted under Canadian law and that assisted suicide is an offence in Canada. He then referred to courts martial pertaining to the mistreatment of the young detainee in Somalia.

[34] I find these submissions orient the discussion in the wrong direction and are of no assistance to the court in determining an appropriate sentence. You were not charged under section 130 of the *NDA* of having committed a grave breach contrary to section 3 of the *Geneva Conventions Act*.[15]You have not been found guilty of murder or of assisting a suicide. The facts surrounding this offence bear absolutely no resemblance to the facts surrounding the atrocities committed on the young Somali. I will say it again: You are to be sentenced for the offence for which you were convicted and not for an offence for which you might have been charged or for an offence for which you were found not guilty. The particulars of the charge do not allege you killed the insurgent; they allege you shot the insurgent.

[35] The prosecutor argued you were in a position of authority and of trust at the time of the offence and he referred the court to Exhibit 54. While it is correct to state that you were in a position of authority, since you were the commander of call sign 72A and the senior Canadian soldier at the location of the insurgent, I do not find that you abused your position of authority and trust when you committed the offence. Nonetheless, your position of authority is a factor that must be considered when determining an appropriate sentence.

[36] Your actions did have a negative impact on your team and on your role as a mentor. Respect for the rule of law is a fundamental value in Canadian society.[16] The Preamble of our *Canadian Charter of Rights and Freedoms*[17] provides that Canada "is founded upon the principles that recognize the supremacy of God and the rule of law." Every Canadian solider is an ambassador of Canadian values. Canadian soldiers become role models for their ANA counterparts through the application of our doctrine, our training, our code of conduct and our rules of engagement. A disciplined approach to war that adheres to our lawful orders and our doctrine ensures the success of the mission. Decisions based on personal values cannot prevail over lawful commands.

[37] You explained to members of your team you felt you had to shoot the insurgent because of his condition. You told Captain Shaffigullah that you wanted to help the insurgent. Your actions might have been motivated by an honest belief you were doing the right thing; nonetheless, you committed a serious breach of discipline. You failed in your role as a leader because you chose to put aside your training and orders. Thus you put your subordinates in one of the most precarious situations imaginable: that of knowing their leader had committed a serious breach of discipline. Now, what were they supposed to do? Report you, as it was their duty, or support their leader, knowing that what he did was unlawful and that their silence was also wrong? Each member of your team has had to make decisions since that incident and has had to live with the consequences that flowed from these decisions. You might have been torn between your personal moral values and your duties as a Canadian soldier when you made your choice; but did you consider the dilemma you were inflicting upon your subordinates?

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[15] R.S., 1985, c.G-3.
[16] *Application under s. 83.28 of the Criminal Code (Re),* 2004 SCC 42 at para. 5.
[17] Part I of *The Constitution Act*, 1982, Enacted as Schedule B to *the Canada Act* 1982, (U.K.) 1982, c. 11

[38] How can we expect our soldiers to follow the laws of war if their officers do not? How can we expect the ANA to follow the laws of war if the Canadian officers mentoring them do not? Captain Semrau, I do not know if you have taken any time to reflect upon these questions in the last year; if you have not, do so, and also consider the effects of your actions on the members of your team.

[39] I have reviewed the cases provided to me by the prosecutor. The cases pertaining to the death of the Somali youth represent factual situations totally different from the case at hand. The actions of the different accused persons and the facts of each case bear very little resemblance to those before me, and, I find, are of no assistance to the court. As indicated by the prosecutor, the case of *Master Corporal Billard*[18] is only included because it refers to the principles of denunciation and of deterrence.

[40] I was also informed of two American court martial cases involving the killing of a wounded and unarmed enemy. Both incidents occurred in 2004 in Iraq. In the first court martial, Captain Maynulet was involved in an operation to capture or kill a high-value target. Immediately after the initial engagement with the enemy, Captain Maynulet shot a mortally wounded insurgent because he thought it was the humane thing to do and that it would ease his suffering. Captain Maynulet was charged with assault with intent to commit murder. He pled not guilty and was found guilty of assault with intent of commit voluntary manslaughter. He was sentenced to dismissal from the service. Evidence at sentencing was extremely favourable for the offender.

[41] The second court martial involved Staff Sergeant Horne. Members of his platoon fired upon trucks carrying insurgents. The second truck was set on fire. Staff Sergeant Horne attempted to save the victim who was sitting in the burning truck loaded with explosives. The victim fell to the ground and was severely injured. Staff Sergeant Horne spoke with his officer and with another staff sergeant about putting the Iraqi out of his misery. The officer told him to do it and the other staff sergeant shot the Iraqi three to five times. When Staff Sergeant Horne realized the Iraqi was still alive, he fired one shot into the victim's head. He did so to put him out of his misery. Staff Sergeant Horne pled guilty to premeditated murder and conspiracy to commit premeditated murder but to took exception to the word "premeditation" and he pled not guilty to solicitation to commit premeditated murder. He was sentenced to confinement for three years, reduction to the rank of private, forfeiture of all pay and allowances and a dishonourable discharge. On appeal, his sentence was reduced to confinement for one year, reduction to the rank of private, forfeiture of all pay and allowances and a bad conduct discharge.

[42] While the facts of these two American cases are somewhat similar to the case before this court, one must also examine the charges before the courts. Staff Sergeant Horne pled guilty to murder and to conspiracy to commit murder; Captain Maynulet was found guilty of assault with intent to commit voluntary manslaughter. You have been found guilty of behaving in a disgraceful manner. While the charges are different,

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[18] *R. v. Billard*, 2008 CMAC 4

I find the facts in the Captain Maynulet case bear a certain degree of similarity to the facts before this court and are of some use in the determination of the sentence.

[43] The prosecutor and your defence counsel could not find any British or Australian jurisprudence pertaining to the offence of behaving in a disgraceful manner; nor have I been presented with any relevant Canadian jurisprudence. A review of courts martial held during the period of 1996 to 2010 reveals that 32 courts were held where the accused was at least charged under section 93 of the *NDA*. During the period of 1996 to 2010, the accused was either found not guilty, the charge was withdrawn or a stay of proceedings was ordered in 16 of these trials. The particulars of 11 of these charges related to conduct of a sexual nature. During the period 2002 to 2010, the accused was found guilty in 16 cases and every charge related to conduct of a sexual nature. Most of these offences were charged in the alternate to a charge of sexual assault or to a charge of sexual harassment. The most severe sentence for an accused found guilty of a sole charge of behaving in a disgraceful manner was dismissal from Her Majesty's service. The most severe sentence when the accused was found guilty of two charges of behaving in a disgraceful manner was dismissal from Her Majesty's service and a $2,000 fine; and the lowest sentence was a severe reprimand and a $1,500 fine. I will now state the obvious: This case is unique and for many reasons.

[44] The Code of Service Discipline contains 60 distinctive military offences that may be found at ss. 73 to 129 of the *National Defence Act*. A review of the maximum sentences prescribed by these service offences indicates that this offence is objectively one of the more serious offences found the Code of Service Discipline. The maximum punishments for 28 of these 60 service offences are punishments of imprisonment for life or imprisonment for more than two years. The maximum punishment for behaving in a disgraceful manner is imprisonment for five years. Therefore, based on the maximum punishment a court martial may impose for this offence, the offence to which you have been found guilty is objectively one of the more serious service offences.

[45] Subjectively, this is also a serious offence. One must examine the conduct of the accused as well as the reasons why this behaviour is deemed disgraceful. The act of unlawfully shooting a wounded and unarmed person is serious. In the military context, you committed a grave breach of discipline because you decided to set aside your orders, training and fundamental principles. As I stated previously, this conduct is deemed disgraceful because it is so fundamentally contrary to our values and training that it is shockingly unacceptable. The profession of arms is synonymous with the management of violence. Officers are ultimately entrusted to lead soldiers and to use weapon systems to put into effect the will of our government. Our discipline and respect for the rule of law ensures that we remain an effective and efficient armed force that reflects Canadian values and makes Canadians proud of its military force's achievements around the world. You personally failed to abide by one of our most important responsibilities: that of only using force in accordance with lawful orders.

[46] Having reviewed the facts of this case, the applicable law, the mitigating and aggravating factors and the jurisprudence, I must now pronounce my sentence.

[47] Captain Semrau, stand up. Captain Semrau, you made a personal decision on 19 October 2008 that has had an impact on the lives of many individuals. You decided to shoot an unarmed and wounded insurgent. Notwithstanding your motive, you chose not to follow the clear directives that had been provided to you throughout your training in the Canadian Forces and by your chain of command. While it appears this breach of discipline is totally out of character, it is nonetheless a serious breach of discipline. Had you respected the clear, simple rules found on your soldier's card and inculcated in every Canadian soldier, you would not have shot the wounded and unarmed insurgent and you would not have behaved in a disgraceful manner.

[48] 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 I do not know if you fully understand what you did and if you fully realize the consequences of your actions. I cannot know because you chose not to address the court. It is your right and I do not infer by my comment that it is an aggravating factor or that I hold it against you. I note your silence because it means I do not know how you perceive your actions and their consequences.

[49] While the *Criminal Code* provides for a minimum sentence for a certain number of offences when a firearm is used in the commission of that offence, one does not find a similar provision in the *National Defence Act*. Having considered the specific circumstances of this offence and of the offender, and the mitigating and aggravating factors, I do not believe that in the present case a sentence of imprisonment is the appropriate minimum necessary sentence to maintain discipline and to restore discipline in the offender and in military society. I would add that separating the offender from society, in our case military society, may be done through incarceration, but also through dismissal from Her Majesty's service.

[50] Dismissal with disgrace from Her Majesty's service is a most severe punishment. A punishment of dismissal with disgrace from Her Majesty's service means you are not eligible to serve Her Majesty again in any military or civil capacity unless there is an emergency or the punishment is set aside or altered. It also affects some of the benefits you could receive upon release from the CF.

[51] While the evidence as found in the exhibits and in the testimony of witnesses demonstrates that you are a person of good character, I have not been presented with any evidence that suggests you take responsibility for your actions and their consequences or that you would not repeat this serious breach of discipline. On 19 October 2008, you chose to shoot an unarmed and wounded insurgent instead of respecting clear, fundamental and unambiguous directives. This behaviour is unacceptable and is disgraceful. Although I have commented at length on the effect of your actions on your men, it does not mean that I am sentencing you for a lack of leadership. Nonetheless, a sentencing judge may take into account the impact of the commission of the offence on the victim, on others, and on the community. Your rank and your position of authority magnified the impact of your unlawful conduct on others.

[52] The court must impose a sentence that will provide a clear message to you and to others that such behaviour is unacceptable and will not be tolerated. The fact that you committed this most serious breach of the Code of Service Discipline when you were in command of call sign 72A as well as the fact that you put your subordinates in such a predicament raises serious questions as to whether you fully understand your responsibilities as an officer. You also demonstrated a lack of self-discipline and of respect for fundamental principles and orders. The sentence I am about to pronounce will address these concerns.

[53] Captain Semrau, having considered the specific circumstances of this offence and of the offender as well as the mitigating and aggravating factors, I conclude that the minimum necessary sentence in the present case is dismissal from Her Majesty's service and a reduction in rank to the rank of second lieutenant.

[54] You may be seated.. The proceedings of the General Court Martial in respect of Second Lieutenant Semrau are terminated.

Counsel:

Lieutenant-Colonel J.A.M. Léveillée, and Captain T. Fitzgerald,
Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

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