



COURT MARTIAL

Citation: *R. v. Jenner*, 2010 CM 1008

Date: 20100416

Docket: 201010

Standing Court Martial

Asticou courtroom
Gatineau, Québec, Canada

Between:

Her Majesty the Queen

- and -

Captain D.E. Jenner, Offender

Before: Colonel M. Dutil, C.M.J.

REASONS FOR SENTENCE

(Orally)

[1] Captain Jenner, having accepted and recorded your plea of guilty to the first charge, the court finds you guilty of that charge for an offence under section 129 of the *National Defence Act*, Conduct to the Prejudice of Good Order and Discipline.

[2] The prosecution and counsel for the defence, both experienced counsel, have made a joint submission on sentence. Counsel have provided extensive submissions in support of their recommendations. They recommend that this court sentence Captain Jenner to a severe reprimand and a fine in the amount of \$2,000. The defence asks that the payment of the fine be made over instalments of \$200 per month starting May 1, 2010. They argued that their recommendation is the minimum sentence applicable in the circumstances.

[3] Although it is true that the court is not bound by the joint recommendation on sentence, it should not be departed from unless it is believed that the recommendation is

contrary to public interest or would bring the administration of justice into disrepute. I have no reason to conclude to the inadequacy of the joint submission on sentence.

[4] It has long been recognized that the purpose of a separate system of military justice is to allow the Armed Forces to deal with matters that pertain directly to discipline, efficiency, and the morale of the military. Offences relating to the conduct to the prejudice of good order and discipline encompass a large spectrum of conducts, omissions, disorders, and neglects. They all have one common element: a direct impact on the discipline, efficiency, and morale of the military. The prejudice to good order and discipline may be established by the particular evidence or it may be drawn from the matters proven in evidence as a natural consequence of the proven conduct.

[5] That being said, the punishment that is imposed by a court, whether it is a civilian court or military court, should always constitute the minimum necessary intervention that is adequate in the particular circumstances of a case. This joint submission respects that principle as well.

[6] The objectives and the principles to be used in considering what should be an appropriate punishment or sentence relates to one or more of the following: the protection of the public and the public includes the interests of the Canadian Forces; the denunciation of the unlawful conduct; the deterrence, not only of the offender, but also of others that might be tempted to commit similar offences; to assist in the reformation or the rehabilitation of the offender; the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender; the sentence also must respect the principle of parity, that is, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in mostly similar circumstances; and finally, the court will look also at the relevant, aggravating, and mitigating circumstances relating to the offender and to the offence

[7] After looking at all those principles and objectives, the court must then consider the joint submission made by counsel in order to assess if all those principles and objectives have been properly considered by counsel in making their submission. Therefore, I have considered that joint submission in light of those principles, objectives, and also in light of the Statement of Circumstances that was provided to the court by the prosecutor, and I endorse their joint recommendation.

[8] The circumstances surrounding this case are very simple, Captain Jenner presided over at the summary trial of a subordinate with whom he was engaged in a sexual relationship at the time of the offence.

[9] I agree with counsel that the essential objective of sentencing in this case is to ensure general deterrence. This is a very serious offence both objectively and subjectively. The conduct of the offender undermined the integrity of the military justice process at the summary trial level, which is essential to the maintenance of discipline. In the Canadian Forces the purpose of summary proceedings is to provide prompt and fair justice in respect of minor service offences and to contribute to the maintenance of mili-

tary discipline and efficiency. Fairness is an essential component of the summary trial process.

[10] Presiding officers must act impartially and separate their personal interests from their decision making powers and duties. If a presiding officer has a direct personal or financial interest in the outcome of a case, that officer cannot preside over the matter. Notwithstanding the presiding officer's best efforts, situations will arise in which the appearance of justice requires that officer to disqualify himself or herself. This will inevitably arise when the presiding officer is in conflict of interest.

[11] The potential for conflict of interest arises when the personal interest of the officer presiding, or of those close to him or her, conflicts with his or her duty to adjudicate impartially whether at a summary proceeding presided by an officer or a judge in any court or tribunal. The tenets of impartiality are twofold: impartiality in fact and impartiality in the perception of a reasonable, fair-minded and informed person. As in judicial matters, the test for conflict of interest includes both actual conflicts between the judge's self-interest and the duty of impartial adjudication and circumstances in which a reasonable, fair-minded and informed person would reasonably apprehend a conflict. As mentioned by counsel for the defence, Captain Jenner was acting as a judge when he presided at the summary trial, he should have thought like a judge.

[12] It is essential that the presiding officer must be seen to be impartial and without having any preference for any position. Not only is it important that the presiding officer be unbiased, but more importantly that there be no appearance or apprehension of bias. The test to ensure fairness is whether a reasonably informed person would perceive bias on the part of an adjudicator.

[13] However, it cannot be forgotten that in relation to summary trials, presiding officers will always have an interest in the discipline of the unit. Discipline within the CF depends upon the personal interaction between members who serve together. Counsel for the prosecution rightly pointed out that in order to enhance impartiality, presiding officers are required to take an oath at the commencement of every summary trial. In the context of a summary trial, it is understood that the presiding officer would inevitably have a personal knowledge of an accused from his own chain of command. This does not amount, *per se*, to a conflict of interest.

[14] It is abundantly clear that a presiding officer at a summary proceeding must, like any judge would do in similar circumstances, disqualify himself or herself if that person is engaged in a close personal relationship with an accused or a witness. This situation constitutes a flagrant conflict of interest. It is irrelevant in such a scenario to even examine whether a reasonable, fair-minded, and informed person would perceive an apprehension of partiality. The situation alone is a very serious conflict of interest. Presiding at the summary trial of a person with whom one has a close personal relationship undermines the integrity of the function of presiding officer vested with authority to provide prompt and fair justice in respect of minor service offences and to contribute to the maintenance of military discipline and efficiency.

[15] In the final analysis, members of the Canadian Forces must know and believe that leaders will deal fairly and objectively with all members' problems, including lapses of discipline. Counsel for the defence submitted that despite Captain Jenner's conflict of interest towards the accused at the summary trial, justice was done. I strongly disagree with that statement. The deleterious effect of adjudicators in conflicts of interest, such as in this particular case, undermines the integrity of the justice process itself. Whether justice is done in such circumstances cannot be measured against the personal treatment of the accused or the outcome of a particular case. I need not to add anything further on this issue.

[16] In accepting the joint recommendation on sentence, I have reviewed the evidence provided to the court with regard to the aggravating and mitigating circumstances of the offence and of the offender. Captain Jenner has been an extremely good performer in recent years, despite significant health issues. Nevertheless, the most significant mitigating factors are the plea of guilty and the acceptance of responsibility by the offender at the earliest opportunity.

[17] Captain Jenner, please stand up. The court sentences you to the following punishments: a severe reprimand and a fine in the amount of \$2,000 payable at a rate of \$200 per month starting on 1st of May, 2010. Should you be released from the CF before the completion of the full payment of that fine, it will be payable immediately on the date of your release.

Counsel:

Major S. MacLeod, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Lieutenant-Commander J. McMunagle, Directorate of Defence Counsel Services
Counsel for Captain D.E. Jenner