COURT MARTIAL

Citation: *R. v. Biron*, 2010 CM 4009

Date: 20100927
Docket: 201013

Standing Court Martial

Canadian Forces Base Winnipeg
Winnipeg, Manitoba, Canada

Between:

Her Majesty the Queen

- and -

Sergeant J.C. Biron, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Sergeant Biron, having accepted and recorded your plea of guilty to charges number 1 and number 2, the court now finds you guilty of these charges. The court must now impose a fit and just sentence.

[2] The statement of circumstances, to which you formally admitted the facts as conclusive evidence of your guilt, provides this court with the circumstances surrounding the commission of these offences. The documentary evidence presented by your counsel and by the prosecution has also provided this court with evidence to assist it in the sentencing phase of this trial. In determining the appropriate sentence the court has considered the circumstances surrounding the commission of these offences, the mitigating circumstances raised by the evidence presented by your defence counsel, the aggravating circumstances raised by the prosecutor and the representations by the prosecution and by your defence counsel and also the applicable principles of sentencing.

[3] Those principles 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.

[4] The court has also considered the guidance set out in sections 718 to 718.2 of the *Criminal Code of Canada*. The purposes and principles enunciated at these sections serve to denounce unlawful conduct, to deter the offender and other persons from committing offences, to separate the offender from society where necessary, to assist in rehabilitating offenders, to provide reparations for harm done to victims or to the community and to promote a sense of responsibility in offenders in acknowledgment of the harm done to victims and to the community.

[5] The court has also given consideration to the fact that sentences of offenders who commit similar offences in similar circumstances should not be disproportionately different. The court must also impose a sentence that should be the minimum necessary sentence to maintain discipline.

[6] The ultimate aim of sentencing is the restoration of discipline in the offender and in military society. Discipline is that 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 interest. 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 which is developed and encouraged by the Canadian Forces through instruction, training and practice; it is an internal quality that is one of the fundamental prerequisites to operational efficiency of any armed force.

[7] The prosecution and your defence counsel have jointly proposed a sentence of a reprimand and a fine in the amount of $1,000.

[8] The Court Martial Appeal Court decision in *R. v. Captain Paquette*, 1998 CMAC 418 clearly stated that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or unless the sentence is otherwise not in the public interest.

[9] You have pled guilty to two charges laid under subsection 125(a) of the *National Defence Act*. With respect to charge number 1, you have admitted that you wilfully made a false entry in section 5a of your Personal Development Review form (PDR) by inserting your own comments about your strengths knowing these comments had not been made by your supervisor. Upon your posting from 16 Wing at CFB Borden to 17 Wing at CFB Winnipeg, you were provided with a paper copy and an electronic copy of your PDR by your supervisor. You were entrusted with this document and with this electronic version and were to deliver the document and the electronic version to your gaining unit in Winnipeg. You modified section 5a "Strengths" of your PDR by adding more favourable comments and you removed a comment from your supervisor recommending you seek medical help because you were

falling asleep while at your desk. You forged the signature of your immediate supervisor and of a master warrant officer and presented this false document to your new supervisor.

[10] With respect to the second charge, you made a false entry in a CF EXPRES program form indicating you had met the incentive program requirements for the CF EXPRES test knowing these results were false. You obtained a blank form used by the PSP staff to record results of the annual CF EXPRES test. You entered information on that form attesting you had met the incentive requirements for the CF EXPRES test knowing this information to be false. You then asked the CFB Borden PSP National Sports Coordinator to enter these results in the CF PeopleSoft program. This individual instructed a member of his staff to enter these results in the PeopleSoft program because he knew and trusted you.

[11] The Supreme Court of Canada touched on the concept of discipline within the Armed Forces at paragraph 60 of its 1992 seminal decision of *R. v. Généreux* [1992] 1 S.C.R. 259. The Court stated that:

> 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. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military....

[12] I will now set out the mitigating circumstances and the aggravating circumstances that I have considered in determining the appropriate sentence in this case. I consider the following to be mitigating:

> You cooperated completely with the military police investigation and you fully admitted your actions to them. 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. Therefore, such cooperation with the police and an early plea of guilty will usually be considered as mitigating factors. Although the doctrine might be divided on this topic, this approach is generally not seen as a contradiction of the right to silence and of the right to have the Crown prove beyond a reasonable doubt the charges laid against the accused but is seen as a means for the courts to impose a more lenient sentence because the

plea of guilty usually means that witnesses do not have to testify and that it greatly reduces the costs associated with the judicial proceeding. It is also usually interpreted to mean that the accused wants to take responsibility for his or her unlawful actions.

Simply put, an accused that pleads guilty at the earliest opportunity lessens the strain on the judicial resources and by doing so usually receives a benefit from this cooperation and from the acknowledgement that he or she is taking responsibility for his or her unlawful actions. The prosecutor has also stated that he would not have been able to prefer these charges without your full confession to the military police.

Your Personal Evaluation Reports found at Exhibit 8 are generally good to excellent. I have also reviewed the letters of appreciation found at Exhibit 9.

Section 162 of the *National Defence Act* stipulates that charges laid under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit. The Supreme Court of Canada in the *Généreux* case emphasized that the military must be in a position to enforce internal discipline effectively and efficiently to maintain the Armed Forces in a state of readiness. Breaches of military discipline must be dealt with speedily. Sergeant Biron gave a written statement to the military police on 10 February 2009 in which he confessed to having committed the two offences. On 6 July 2009, at the request of the military police, he once again provided a written statement confessing to having committed the two offences. Sergeant Biron was charged on 25 January 2010. The prosecutor has indicated he considered the pre-charge delay when agreeing to the joint submission. Although I gather from the prosecutor's brief reply to my question that this delay occurred solely during the investigation of this offence, I have not been presented with any evidence to explain precisely this delay. It would appear the first confession provided in February 2009 contained the necessary evidence for the laying of charges yet charges were not laid before 25 January 2010. Based on the evidence presented in this trial, I have to wonder if the individuals involved in this file understood the concept of discipline in the Canadian Forces and the need that breaches to the Code of Service Discipline be dealt with as soon as possible. Such delays in the investigation and in the laying of charges are detrimental to the Canadian Forces and to the accused. I will give this factor some weight and include it as a mitigating factor.

Although you have a conduct sheet, I do note the last offence occurred in 1985. You were found guilty of impaired driving by a civilian criminal court in 1984 and you were found guilty of having fought with a person subject to the Code of Service Discipline in 1985 when you were at CFB Cornwallis. You were found guilty of absence without leave during the personnel evaluation reporting period of 1 April 2008 to 31 March 2009 and your Member's Personal Record Résumé indicates two days of forfeiture for AWOL. You were

sentenced to $200 but this offence has been removed from your conduct sheet in accordance with DOAD 7006-1. Although I will agree with your counsel that, for the purposes of this sentencing, you may be considered a first-time offender since the offences found on your conduct sheet occurred over 25 years ago and are quite different from the offences before this court, I will tell you that I am far from impressed with you. You need to seriously look in a mirror and gaze within yourself. You do not appear to possess the self-discipline and the leadership that we expect of a sergeant.

I will now address the aggravating factors of this case:

As a sergeant with approximately 28 years of experience at the time of the offences, you knew clearly the importance of acting ethically and in accordance with the Code of Service Discipline. You knew that what you were doing was wrong.

Each offence was premeditated and required a certain effort on your part. You also committed two similar offences in a span of a few months. You also abused the trust of two individuals when committing these offences. Abuse of trust is usually an aggravating factor in any sentencing but it is more so in the military context. We must trust our colleagues, our subordinates and our superiors because of the very essence of our organisation. Trust can mean the difference between life and death in a theatre of operations or in certain operational circumstances. Trust is built throughout a lifetime and can disappear in an instant. I strongly recommend you reflect on this once you leave this courtroom.

You have pled guilty to and have been found guilty of two charges laid under subsection 125(a) of the *National Defence Act*. The Code of Service Discipline contains 60 distinctive military offences that may be found at sections 73 to 129 of the *National Defence Act*. A review of the maximum sentences prescribed by these different offences indicates that, for 27 of the 60 offences, the punishment of imprisonment for less than two years is the maximum punishment that may be imposed by the court and for 5 of the 60 offences, the punishment of dismissal with disgrace from Her Majesty's service is the maximum punishment that may be imposed by the court. The maximum punishment for the 28 other offences are punishments that are higher in the scale of punishments than the punishment of dismissal with disgrace from Her Majesty's service. Section 125 is one of the 28 other offences. Therefore, based on the maximum punishment a court martial may impose for this offence, the offence to which you have pled guilty is objectively one of the more serious offences found in the Code of Service Discipline.

[13] I have reviewed the medical documents found at Exhibit 10. They explain that you suffer from severe obstructive sleep apnea. I cannot agree with your counsel that they explain why you deleted—or help explain why you deleted from your PDR the

comment from your supervisor that you should seek medical help because you were falling asleep at your desk. As I understand it, your supervisor was trying to help you and you deleted this comment in your PDR. Your commanding officer at 402 Squadron had to order you to report to a doctor to ascertain whether any medical condition exists that would explain your problems with sleeping at work. It does not seem that you made any effort to deal with your problem until you were ordered to do so. Again, I am not impressed with this evidence. I do not find that I can give much weight to this evidence during the sentencing phase.

Sergeant Biron, stand up.

[14] I have taken into account the specific facts surrounding the commission of this offence and the character of the offender as well as the cases as presented by counsel. Having said that, I have been provided very little evidence, or I should say no evidence, to explain why you committed these offences. Although I do find this sentence to be at the lower end of the spectrum, I have determined that the minimum necessary sentence to maintain discipline for this type of offence committed by this type of offender is reflected in the joint submission presented by counsel. And when I say minimum, I mean minimum. Count yourself lucky the law requires me to accept this joint submission unless the jointly proposed sentence would bring the administration of justice into disrepute or is not in the public interest.

[15] Sergeant Biron, I sentence you to a reprimand and a fine in the amount of $1,000.

Counsel:

Major B. McMahon, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Lieutenant-Commander B.G. Walden, Directorate of Defence Counsel Services
Counsel for Sergeant J.C. Biron