



COURT MARTIAL

Citation: *R v Tomczyk*, 2011 CM 4023

Date: 20110910

Docket: 201123

General Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Bombardier N. Tomczyk, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Bombardier Tomczyk, the panel of the General Court Martial found you guilty of conduct to the prejudice to good order and discipline. I must now impose a just and appropriate sentence. 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 facts, expressed or implied, that are essential to the panel's verdict of guilty as set out in article 112.54 of the QR&O. I must find only those facts necessary to permit the proper sentence to be imposed in the case at hand (see *R v Ferguson* 2008 SCC 6 at paragraph 18).

[2] I gather from the panel's decision that they did not believe your version of events concerning your discussion with Captain Fraser and your medical condition. I understand they concluded that you had an obligation to attend the Base Medical Clinic during your HLTA and that you failed to do so. You returned to Afghanistan but were unable to return to Patrol Base Shoja and perform your duties with your battery. I understand they also concluded that this conduct was prejudicial to good order and discipline.

[3] Having established the facts needed to determine the appropriate sentence, I will 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 (see *R v Tupper* 2009 CMAC 5 at paragraph 13).

[4] The CMAC also clearly stated in *Tupper*, at paragraph 30, that the fundamental purposes and goals of sentencing as found in the *Criminal Code of Canada* apply in the context of the military justice system and a military judge must consider these 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 others 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 acknowledgment of the harm done to victims and to the community.

[5] 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 (see *R v Angelillo* 2006 SCC 55, at paragraph 22). A sentence must also be similar to other sentences imposed in similar circumstances (see *R v L.M.* 2008 SCC 31, at paragraph 17). The principle of proportionality is at the heart of any sentencing. The Supreme Court of Canada tell us, at paragraph 42 of *R v Nasogaluak* 2010 SCC 6, 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.

[6] 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 and aggravating factors will move the sentence along the scale of appropriate sentences for similar offences (see *Nasogaluak*, paragraphs 43 and 44).

[7] The Court Martial Appeal Court also indicated that the particular context of military justice may, in appropriate circumstances, justify and, at times, require a sentence which will promote military objectives (see *Tupper* at paragraph 31). 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.

[8] Discipline is at the very heart of every efficient and effective military force. This maxim is not new. Machiavelli wrote: "Few men are brave by nature, but good order and experience make many so. Good order and discipline in an army are more to be depended upon than courage alone."

[9] 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 or death.

[10] The prosecution suggests that the following principles of sentencing apply in this case: general and specific deterrence and denunciation. The prosecution has provided this court with two cases in support of its submission that the minimum sentence in this matter is a fine in the amount of \$5,000 and confinement to barracks for a period of 21 days. Defence counsel asserts that a fine in the amount of \$200 would represent a just sentence in this exceptional case. She has also suggested that a reprimand and a larger fine would be appropriate if I do not agree with her primary suggestion. She argues that specific deterrence is not necessary in this case.

[11] I will now examine the mitigating factors in this case. You do not have a conduct sheet; you are a first-time offender.

[12] I have carefully reviewed Exhibit 14, 3 Personnel Evaluation Reports, Exhibit 15, 2 Personnel Development Reviews, Exhibit 16, 2 documents pertaining to your accelerated promotion to Bombardier, and Exhibit 13, 3 course reports. You are described in your PERs as a dedicated and committed soldier who sets an example for others. Your performance was rated as mastered and exceeded standard and you were assessed as possessing above average potential. You have also excelled in your Basic Recce Technician course, your Artillery Communications course and your Remote Weapons System Operator course. While you were scheduled to be promoted to your present rank on 23 January 2009, you were recommended for an accelerated promotion by your battery commander and you were promoted in October 2008.

[13] You have performed well during your short career. Your performance during your deployment in Afghanistan in 2007 was described as outstanding in the PDR found at Exhibit 15 and you performed well while deployed at Patrol Base Shoja in 2010 as indicated at Exhibit 5. Your chain of command also considers that you possess

the potential to succeed and progress within the Artillery. It would thus appear from this evidence that this conduct is an isolated incident.

[14] I have also considered the following aggravating factors:

- (a) You were 25 years old at the time of the offence and you had been a member of the CF for 5 years. I do not consider you a youthful offender. You had previously deployed to Afghanistan in 2007. You were fully aware of the possible impacts of your conduct on your fellow soldiers in theatre.
- (b) Conduct to the prejudice of good order and discipline is also an objectively serious offence since its maximum sentence is dismissal with disgrace from Her Majesty's service. Subjectively, this is also a serious offence. Any offence that is deemed to have had a negative impact on good order and discipline in a theatre of operations must be considered serious.

[15] I have reviewed the cases provided to me by the prosecutor. I fail to see how the Court Martial Appeal Court decision in *R v Billard* (2008 CMAC 4) is useful in these proceedings since the facts in that case are totally different from the case at hand. Master Corporal Billard refused to get out of bed and perform his duties during a stand-to when the forward operating base (FOB) in which he was present was under direct attack. Master Corporal Billard's conduct was much more egregious than Bombardier Tomczyk's conduct. Master Corporal Billard failed to perform his duties when the FOB was under attack. Bombardier Tomczyk failed to report to the Base Medical Clinic and returned to Afghanistan. While his neglect ultimately prevented him from returning to his duties at the patrol base, there is no evidence before this court to demonstrate that this was his clear intention.

[16] Bombardier Parent pled guilty to one charge of neglect to the prejudice of good order and discipline. Over a period of seven months, he failed on 11 occasions to inform the medical authorities that he would not be reporting for a medical appointment at the base medical center. A joint submission of a fine in the amount of \$2,500 was presented by counsel and accepted by the military judge.

[17] I do not agree with the prosecutor that the Parent decision stands as the lower end of the sentencing range for such cases. That case cannot be presented in isolation to support such an assertion. The facts in the Parent decision are quite different from the facts of the present case. While a sentence must be similar to other sentences imposed in similar circumstances, a sentencing judge must take into account the circumstances of the offence and the specific circumstances of the offender. I must weigh the objectives of sentencing that reflect the specific circumstances of the case.

[18] Defence counsel submits that mistake of fact should be considered in mitigation of sentence as was honest but mistaken belief of the law by the Court Martial Appeal

Court in *R v Liwji* 2010 CMAC 6 decision. She submits that Bombardier Tomczyk understood that he was only receiving advice from Captain Fraser to attend the Base Medical Clinic. I have already stated that I understand from the panel's decision that they did not believe your version of events concerning your discussion with Captain Fraser and your obligation to present yourself to the Base Medical Clinic. I cannot now believe your testimony if I have concluded the panel has not believed it. Therefore, I will not accept defence counsel's suggestion on this issue.

[19] Defence counsel also suggests the sentence in the *Captain Clark* court martial (*R v Clark*, 2011 CM 4004) should be considered the absolute ceiling in terms of sentencing. Captain Clark, at the conclusion of a complete trial, was found guilty of having disobeyed a lawful command of a superior officer and of lying thus prejudicing good order and discipline. The military judge agreed with the joint submission of counsel and sentenced Captain Clark to a reprimand and a fine in the amount of \$1,000.

[20] I do not agree with defence counsel that the Clark decision stands as the high end of the sentencing range for such cases. As mentioned earlier in this decision that case cannot be presented in isolation to support that assertion. The facts in the *Clark* decision are quite different from the facts of the present case. I do note that the *Parent* and *Clark* decisions are cases where the military judge was presented with a joint submission on sentencing. The prosecutor and defence counsel both know the law pertaining to joint submissions and how it differs from a situation where a judge is not faced with a joint submission.

[21] I must now pronounce my sentence. Bombardier Tomczyk, stand up.

[22] Evidence before this court seems to indicate that you possess the qualities to become a productive member of the Canadian Army. I sincerely hope that you have learned from this court martial and that you will move on and become a valued non-commissioned officer.

[23] I believe this sentence must focus primarily on the denunciation of the conduct of the offender and on general deterrence. 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 court must also take into account the circumstances of the offender and the rehabilitation of the offender.

[24] Bombardier Tomczyk, having considered the specific circumstances of this offence and of the offender as well as the mitigating and aggravating factors, I conclude that this is the minimum necessary sentence to maintain discipline.

FOR THESE REASONS, THE COURT:

[25] **SENTENCES** Bombardier Tomczyk to a reprimand and a fine in the amount of \$1,500. The fine will be paid in monthly payments of \$100 starting on 30 September 2011.

Counsel:

Major E. Carrier, Director of Military Prosecutions
Counsel for Her Majesty the Queen

Major S. Collins, Directorate of Defence Counsel Services
Counsel for Bombardier N. Tomczyk