



## COURT MARTIAL

**Citation:** *R v Day*, 2011 CM 4027

**Date:** 20111128

**Docket:** 201147

Standing Court Martial

Canadian Forces Base Gagetown  
Gagetown, New Brunswick, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Captain T. Day, Offender**

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

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### **REASONS FOR SENTENCE**

(Orally)

[1] Captain Day, at the conclusion of a full trial, the court found you guilty of charge No. 2 and directed a stay of proceedings for charges No. 1 and 4. The court ordered a stay of proceedings for charge No. 1 because it had found that the rule in *Kienapple* applied to charges 1 and 2. Charges 2 and 4 had been laid as alternate charges. Having found you guilty of these two charges, the court ordered a stay of proceedings for charge No. 4. You were found not guilty of charge No. 3. The court has found you guilty of the offence of negligent performance of a military duty. The court must now impose a fit and just sentence.

[2] Captain Day was found guilty of negligently performing his duties as a duty officer in the command post of Forward Operating Base (FOB) Ma'Sum Ghar. He failed to maintain situational awareness on friendly forces operating within range of his main camp defence platform and in an area that had been the launch site of numerous rocket and mortar attacks against FOB Ma'Sum Ghar.

[3] Captain Day had been alerted by the tank crew manning Run-up 3B of the presence of a friendly patrol at grid reference 3181 9322 and they had requested more information but he did not perform the necessary actions to provide 3B with those details that were readily available to him. Approximately three hours later, he again failed to monitor the communications system that warned him that the infantry patrol that had originally been observed by 3B was about to conduct a blow in place (BIP) operation at grid reference 3271 9473. These two locations are situated in the area of influence of FOB Ma'Sum Ghar and in the general area of the launch of rocket attacks. He did not warn Run-up 3B of that BIP.

[4] Run-up 3B mistook the BIP for the launch of a rocket against FOB Ma'Sum Ghar and engaged the site of the explosion by firing one 120-millimetre HEAT round. Although shrapnel fell close to numerous soldiers, no one was injured.

#### General Principles of Sentencing

[5] 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 paragraph 13).

[6] The Court Martial Appeal Court 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 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 acknowledgment of the harm done to victims and to the community.

[7] The sentencing provisions of the *Criminal Code*, sections 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 (see *R v Nasogaluak* 2010 SCC 6 at paragraph 41). The Supreme Court of Canada tell 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.

[8] 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).

[9] 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. Only one sentence is imposed upon an offender, whether the offender is guilty of only one or numerous offences, and the sentence may be composed of more than one punishment.

[10] The prosecution suggests that the following principles of sentencing apply in this case: denunciation, general and specific deterrence and the need to promote a sense of responsibility in the offender and the acknowledgement of the harm done to victims and to the community. The prosecution has provided this court with three cases in support of its submission that the minimum sentence in this matter is a severe reprimand and a fine in the amount of \$6,000. Defence counsel asserts that a reprimand and a fine in the amount of \$2,000 to be paid in monthly payments of \$400 would represent a just sentence in this case. He argues that the only sentencing principle applicable in this case is the promotion of a sense of responsibility in the offender.

[11] I will now examine the mitigating factors in this case. You do not have a conduct sheet; thus you are a first time offender. You were 28 years old at the time of the offence. You had joined the Regular Force in August 2005. You were promoted to the rank of second lieutenant in August 2005. You were qualified as an armour officer in August 2007. You were promoted to the rank of lieutenant in September 2007 and you joined the Lord Strathcona's Horse (Royal Canadians) in Edmonton in October 2007 as a troop commander. You were deployed in Afghanistan in September 2008 and you were promoted to your present rank in September 2008. You were a relatively inexperienced junior officer, having only benefitted from one year as a troop commander prior to your deployment to Afghanistan. You basically had but one year

under your belt as an officer before your promotion to your present rank. As such, I will consider this inexperience as a mitigating factor.

[12] Having reviewed your Member's Personnel Record Résumé found at Exhibit 25, I understand you had initially joined the Reserve Force in 1999 and had served as an infantryman. I also understand from Exhibit 25 that you participated in a deployment under SFOR.

[13] I have carefully reviewed Exhibit 27, four Personnel Evaluation Reports (PER). You are described in your Personnel Evaluation Reports as a very astute and dedicated officer who has an ability to form a cohesive team with his senior NCOs and his troops. Your April 2008 to March 2009 annual PER includes your tour in Afghanistan and your performance is assessed as skilled. The 3 RCR Battle Group Commanding Officer commented favorably on your capacity to provide well thought out plans. You are now rated as above average for potential for promotion to major.

[14] You exercised your right to plead not guilty. You were found guilty by this court 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 the 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 a judicial proceeding. It is also usually interpreted to mean that the accused wants to take responsibility for his or her unlawful actions.

[15] An accused that pleads not guilty cannot hope to receive the same consideration from the judicial process. 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. Although you admitted your mistake to Captain Vincent after the incident, I do not consider this exchange to have the same weight as a mitigating factor as does a plea of guilty to a charge. I have not been provided with any evidence that demonstrates you truly accept responsibility for your negligence and its consequences.

[16] I have been advised by the prosecutor that you have the support of your chain of command. I will accept it as a fact but cannot give it as much weight as I could have had I been presented with evidence in the form of witnesses or letters of support that supports this assertion.

[17] Your defence counsel suggests that a stigma will be attached to this conviction and that your professional reputation could well be harmed permanently. As I just said, it appears that you have the support of your chain of command. As with any trial, the court martial proceedings, hopefully, serve as a deterrent and as denunciation of the conduct of the offender. Having said this, I have no evidence before me that you will suffer some special form of stigma or a lifelong consequence associated with this conviction other than the normal consequences of any conviction. As such, I do not give this suggestion of some special stigma any weight as a mitigating factor.

[18] I have also considered the following aggravating factors. Section 139 of the *National Defence Act* reads as follows:

The following punishments may be imposed in respect of service offences and each of those punishments is a punishment less than every punishment preceding it:

- (a) imprisonment for life;
- (b) imprisonment for two years or more;
- (c) dismissal with disgrace from Her Majesty's service;
- (d) imprisonment for less than two years;
- (e) dismissal from Her Majesty's service;
- (f) detention;
- (g) reduction in rank;
- (h) forfeiture of seniority;
- (i) severe reprimand;
- (j) reprimand;
- (k) fine; and
- (l) minor punishments.

[19] Section 124 of the *NDA*, negligent performance of a military duty, is an objectively serious offence since one can be sentenced to dismissal with disgrace from Her Majesty's service or to lesser punishment.

[20] I also find this offence to be subjectively serious. The engagement of Canadian troops by a Canadian tank is the direct consequence of your negligence. I do not agree with defence counsel that the fact that lives were put at risk is a hypothetical matter and I would think that the members of the infantry patrol at the receiving end of the 120-millimetre round as well as the crew commander of the tank would agree with me. You should consider yourself quite lucky that no one was injured by the blast and shrapnel of the 120-millimetre HEAT round fired by the Leopard 2 tank at Canadian infantry soldiers.

[21] The damage done to the village by the shrapnel also caused unnecessary hardships on the local Afghans as well as affected negatively the good relationship the Canadian troops had with the Afghans.

[22] Master Corporal Dickison's trust in the command post was adversely affected by your negligence. He lost his trust in the command post and he felt numerous emotions associated with the thought that he could have killed fellow soldiers. The soldiers of the infantry platoon also became wary of the tanks and their platoon commander had to change his exit route to a more dangerous route to avoid remaining within sight of Run-up 3B. Several infantry soldiers continued to need further assurance from their platoon commander concerning the roles of the tanks in subsequent operations. Your negligence had a negative impact on numerous soldiers; luckily, none were injured physically.

[23] While the consequences of your negligence is an element of the section 129 offence, you are being sentenced for your negligence under section 124 of the *National Defence Act*. Therefore, I find the consequences of your negligence may be considered as a sentencing factor.

[24] This offence occurred in Afghanistan, an active theatre of operations. This is an aggravating factor since the lives of our soldiers are constantly at risk; every officer must ensure that he or she performs his or her duties to the best of his or her abilities to ensure the success of the mission and, as importantly, the safety of our soldiers. It is a leadership responsibility. You failed to perform your duties as was expected of you and thus placed the lives of Canadian soldiers in jeopardy.

[25] I have reviewed the cases provided to me by the prosecutor. In the *Master Corporal Elliott* Standing Court Martial (*R v Elliott* 2010 CM 3019) the accused pled guilty to one offence laid under section 124 of the *NDA*.

[26] The aggravating factors in that case were the objective seriousness of the offence; the subjective seriousness, specifically that he had been cleaning his 9-millimetre pistol in his room, had loaded it with live ammo, had aimed it improperly and had shot a soldier, but the injury did not result in a permanent incapacity. He had a previous conviction three years before for a section 129 offence of negligent handling of a 9-millimetre pistol. His lack of concern for the safety of others and his recklessness were difficult to reconcile with rank and experience.

[27] The mitigating factors were his guilty plea and his performance in his military career; the fact that he faced a court martial; his chain of command still had confidence in him; and the last mitigating factor was his medical condition. The sentencing judge accepted the joint submission of detention for 10 days and a \$5,000 fine.

[28] In the *Warrant Officer Thibault* Standing Court Martial (*R v Thibault* 2010 CM 3022) the accused pled guilty to two charges laid under section 124. While deployed in Afghanistan, Warrant Officer Thibault was responsible for a range. While a master

corporal was firing a C7 assault rifle, Warrant Officer Thibault threw a "sound and flash grenade" at the firer's feet. The detonation is designed to confuse firers' hearing and sight, and this is what happened, but the firer managed to remain in control of his weapon. That same day, without supervision, Warrant Officer Thibault grabbed an M72 and fired a first and second shot at a wooden palette on the range without making sure that the area was clear in accordance with the applicable safety standards; that is, approximately 250 metres. Individuals were standing approximately 30 metres away from the target.

[29] The aggravating factors were the objective seriousness of the offence; the subjective seriousness being the reckless disregard Warrant Officer Thibault demonstrated in the circumstances; that the offence occurred in an operational theatre; and the degree of responsibility of the offender as he was responsible for the range.

[30] The mitigating factors were the guilty plea; he was a first time offender; the administrative consequences of his actions and that he had been repatriated to Canada; it was deemed an isolated incident; there were no tangible and adverse consequences in that no one was wounded; and also the fact that he faced a court martial. The sentencing judge accepted a joint submission of a severe reprimand and a \$2,000 fine.

[31] In the *Captain Leslie* Standing Court Martial (*R v Captain J.D. Leslie* 2008 CM 2015) the accused pled guilty to one offence laid under section 124 of the *NDA*. Captain Leslie was the Command Post Officer and Senior Technical Gunnery Officer at an artillery position in Kandahar Province, Afghanistan, supporting a company of Canadian soldiers who, with their Afghan allies, were engaged in a combat operation against Taliban insurgents.

[32] When the Taliban fighters began to withdraw, artillery fire was called in to cut off the withdrawal. Because of a series of errors and misjudgements on the part of the offender, the artillery fire from one gun was misdirected and a total of three rounds impacted in the immediate vicinity of the Canadian soldiers. No one was seriously injured. The offender immediately investigated and determined the cause of the misdirected fire, and promptly admitted his full responsibility. Captain Leslie waived his rights, made a written statement and admitted his mistakes and accepted full responsibility.

[33] The prosecutor suggested a sentence of forfeiture of seniority and a \$4,000 fine. Defence counsel suggested a sentence of a reprimand and a \$2,000 fine. The sentencing judge imposed a sentence of a severe reprimand and a \$4,000 fine.

[34] Your defence counsel has argued that the *Captain Leslie* court martial is the only case presented that comes close to the facts of our court martial. He argues that Captain Leslie committed a series of errors and that these types of mistakes are not present in our case.

[35] I agree with your counsel that the *Captain Leslie* court martial is the most similar case to our case, but I disagree that the series of mistakes and errors that occurred in the *Captain Leslie* trial are not present in our case.

[36] You were alerted by Run-up 3B to the fact that a friendly patrol was operating in the proximity of your area of operation and within sight of 3B. You failed to pay attention to this information. You were later alerted on the MIRC that this friendly patrol would conduct a BIP in an area that was of great importance for FOB Ma'Sum Ghar. Again, you did not pay attention to this information. You also had numerous opportunities to become aware of their presence and to inform 3B but you failed to do so.

[37] Captain Leslie took full responsibility for his actions and their consequences from the time of the incident to his trial. While you might have told Captain Vincent that you took full responsibility for your actions, you have not done so before this court. This is one important difference between the present case and the *Captain Leslie* court martial. The fact that no one was injured is also an important difference between the present case and the *Captain Leslie* court martial, although it is only a matter of luck.

[38] Captain Day, stand up. I believe this sentence must focus primarily on the denunciation of the conduct of the offender and on the need to promote a sense of responsibility in the offender and the acknowledgement of the harm done to victims and to the community.

[39] In determining the appropriate sentence, the court has considered the circumstances surrounding the commission of this offence, the mitigating and aggravating circumstances presented by your counsel and by the prosecutor and the representations by the prosecution and by your defence counsel as well as the applicable principles of sentencing. The court must impose a sentence that will provide a clear message to you and to others and will assist you in taking responsibility for your offence.

**FOR THESE REASONS, THE COURT:**

[40] **SENTENCES** Captain Day to a reprimand and a fine in the amount of \$5,000. The fine shall be paid in monthly instalments of \$400, commencing on the 15th day of December 2011.

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**Counsel:**

Lieutenant-Commander D.T. Reeves, Canadian Military Prosecution Services  
Counsel for Her Majesty the Queen

Lieutenant-Commander B.G. Walden, Directorate of Defence Counsel Services  
Counsel for Captain T. Day