Citation: *R. v. Private S.B. Noah*, 2008 CM 3016

Docket: 2008-28

STANDING COURT MARTIAL
CANADA
MANITOBA
17 WING WINNIPEG

Date: 16 April 2008

PRESIDING: LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

HER MAJESTY THE QUEEN
v.
PRIVATE S.B. NOAH
(Offender)

SENTENCE
(Rendered orally)

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[1] Private Noah, having accepted and recorded a plea of guilty in respect of the first and only charge on the charge sheet, the court finds you now guilty of this charge.

[2] The military justice system constitutes the ultimate mean to enforce discipline in the Canadian Forces, which is a fundamental element of the military activity. The purpose of this system is to prevent misconduct, or in a more positive way, see the promotion of good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusty and reliable manner, successful missions.

[3] As stated by a legal officer, Major Jean-Bruno Cloutier, in his thesis on the use of section 129 *NDA* offences, the military justice system, "has for purpose to control and influence the behaviours and ensure maintenance of discipline with the ultimate objective to create favourable conditions for the success of the military mission." The military justice system also ensures that public order is maintained and that those who are subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[4] It has been long recognized that the purpose of a separate system of military justice or tribunals is to allow the Armed Forces to deal with matters that

pertain to the respect of the Code of Service Discipline and the maintenance of efficiency and morale among the Canadian Forces. That being said, the punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances. It also goes directly to the duty imposed to the court to "impose a sentence commensurate with the gravity of the offences and the previous character of the offender," as stated at QR&O article 112.48 (2)(*b*). Here, in this case, the prosecutor and the counsel for the accused have made a joint submission on sentence. They have recommended that this court sentences you to detention for a period of 14 days and a fine in the amount of $1000. They both also recommended that his court suspend the sentence of detention.

[5] Although this court is not bound by this joint recommendation, it is generally accepted, as mentioned by the Court Martial Appeal Court at paragraph 21 in its decision of *Private Taylor v. R.*, 2008 CMAC 1, quoting *R. v. Sinclair,* [2004] M.J. No. 144; 185 C.C.C. (3d) 569, that:

> "The sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons may include, among others, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest."

[6] The court has considered the joint submission in light of the relevant facts set out in the statement of circumstances and the admissions and their significance, and I have also considered the joint submission in light of the relevant sentencing principles, including those set out in sections 718, 718.1, and 718.2 of the *Criminal Code,* when those principles are not incompatible with the sentencing regime provided under the *National Defence Act*. These principles are the following:

> Firstly, the protection of the public, and the public includes the interests of the Canadian Forces;
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> Secondly, the punishment of the offender;
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> Thirdly, the deterrent effect of the punishment, not only on the offender, but also upon others who might be tempted to commit such offences;
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> Fourthly, the reformation and rehabilitation of the offender;
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> Fifthly, the proportionality to the gravity of the offence and the degree of responsibility of the offender; and
>
> Sixthly, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

The court has also considered the representations made by counsel, including the case law provided to the court and the documentation introduced.

[7] I must say that I agree with the prosecutor when he expressed the view that the protection of the public must be ensured by a sentence that would emphasize specific and general deterrence. It is important to say that general deterrence means that the sentence imposed should deter not simply the offender from re-offending, but also others in similar situations from engaging, for whatever reasons, in the same prohibited conduct. It is also important to say that some consideration must be given to specific deterrence and rehabilitation in this case.

[8] Here, the court is dealing with an offence for possessing 11.2 grams of marihuana and less than a gram of cannabis resin. It is a serious offence. However, the court will still impose what it considers to be the necessary minimum punishment in the circumstances.

[9] As a matter of context, it is important to remember that the Court Martial Appeal Court articulated clear reasons, to which I agree, to explain why the involvement of drugs in a military environment must be treated as a very serious matter. In the decision of MacEachern v. J., 4 C.M.A.R. 447, judge Addy said:

> Because of the particularly important and perilous tasks which the military may at any time, on short notice, be called upon to perform and because of the team work required in carrying out those tasks, which frequently involve the employment of highly technical and potentially dangerous instruments and weapons, there can be no doubt that the military authorities are fully justified in attaching very great importance to the total elimination of the presence of and the use of any drugs in all military establishments or formations and aboard all naval vessels or aircraft. Their concern and interest in seeing that no member of the forces uses or distributes drugs and in ultimately eliminating their [its] use, may be more pressing than that of civilian authorities.

[10] In arriving at what the court considers a fair and appropriate sentence, the court has considered the following mitigating and aggravating factors.

[11] The court considers as aggravating:

a. The objective seriousness of the offence. The offence you were charged with was laid in accordance with section 130 of the National Defence Act for possessing 11.2 grams of marihuana and less than a gram of cannabis resin contrary to subsection 4(1) of the Controlled Drugs and Substances Act. This offence is punishable by a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, or to less punishment because of the

application of subsection 4(5) of the Controlled Drugs and Substances Act.

b. The subjective seriousness of the offence. On your transfer from the Reserve force to the Regular force in February 2006, you were told about Canadian Forces Drug Policy. In fact, you were advised that the possession of drugs, such as marihuana, was not tolerated in the Canadian Forces under any circumstances. Despite this clear warning, you were found, about a year later, in possession of illicit drugs.

c. The amount of drug in your possession at the time of the incident. The evidence put before this court martial disclosed that you were in possession of 11.2 grams of marihuana and rolling papers. There was enough marihuana to make 33 joints, which is consistent with somebody contemplating a personal use of it on a fairly regular basis.

d. The fact that the drugs were found and seized within the limits of a military establishment, which is the one in fact you were living and working on a daily basis.

[12] The court considers that the following circumstances mitigate the sentence:

a. Through the facts presented to this court, the court also considers that your plea of guilty is a clear genuine sign of remorse and that you are very sincere in your pursuit of staying a valid asset to Canadian Forces and the Canadian community. It disclosed the fact that you're taking full responsibility for what you did. Also, the court would not want to jeopardize your chances of success because rehabilitation is always a key element when sentencing a person.

b. The fact that you took, on your own initiative, appropriate steps, a short time after the incident, in order to control any addiction issue you had regarding drugs.

c. Your record of service in the Canadian Forces. It appears from the evidence produced before this court that you are a good team worker, have good skills and that you are performing well in your trade, to the extend that your Commanding Officer is ready to recommend your retention in the Canadian Forces despite what you did. Moreover, there is a clear indication that the chain of command as trust in you by contemplating a deployment for you in October 2008.

d. Your age and your career potential as a member of the Canadian Forces. Being 26 years old, you have many years ahead to contribute positively to the society in general as well as in the Canadian Forces.

e. The fact that you did not have a conduct sheet or criminal record related to similar offences.

f. The fact that you had to face this court martial. It has had already some deterrent effect on you and also on others. The court is satisfied that you will not appear before a court for a similar or any offence in the future.

g. The fact that you were put under counselling and probation up for a period of one year ending on 18 September 2008. I recognize clearly that this administrative measure do not constitute a disciplinary sanction in itself. However, it has some specific deterrence on you and may have limited general deterrence on others. It also reflects some kind of denunciation in relation to your conduct.

[13] Once the final addresses on sentence was made by both counsel, the court indicated to them right away that it was considering departing from the joint submission they proposed. Essentially, I indicated that circumstances of this case, including those introduced as aggravating and mitigating factors, did not seem to support incarceration as a fit sentence. I informed them that I was considering a severe reprimand instead of the incarceration, combined with a fine as they suggested. Further to an adjournment, then, the court allowed them to make further submissions in order to justify their proposal.

[14] I consider that I have to depart partially from the joint submission submitted by counsel because the proposed sentence is unfit and unreasonable only on the issue of incarceration. The court does consider as appropriate a combination of a different punishment with a fine to the amount of 1 000$.

[15] As stated in *R*.v. *Gladue*, [1999] 1 S.C.R. 688 at paragraphs 38 and 40, and confirmed by the Court Martial Appeal Court in its decision of *R*. v. *Baptista*, 2006 C.M.A.C. 1, the sentence of imprisonment must be imposed only as a last resort. Here, considering all the aggravating and the mitigating factors, I do not see any reason, in the specific circumstances of this case that would justify depriving the offender of his liberty as a last resort issue. Even though the subject of drugs is a serious matter in the military environment and as a disciplinary matter, the court is dealing with a first time offender who recognized and admitted what he did and took steps on his own in order to control and get rid of its addiction problem, in order to secure his future as an individual and in the military. Moreover, the military itself has imposed to the offender some control measures in order to make sure that such thing does not happen again.

[16] So, why the court would give consideration to incarceration, as suggested, in a context where the court is satisfied of the accused's awareness about the seriousness of his fault and his actions to get away from the problem? Clearly, it does appear to me that incarceration is not, in the circumstance of this case, a sentence commensurate with the gravity of the offence and the previous character of the offender.

[17] Moreover, the prosecutor submitted in his additional submission to justify the proposal to this court, the Supreme Court of Canada decision in *R*. v. *Malmo-Levine*; *R*. v. *Caine*, [2003] 3 S.C.R. 571, to support the fact that incarceration is often considered by courts as punishment for the offence of possession under section 4 of the *Controlled Drugs and Substances Act*. In that decision, the legal issue was about whether the prohibition, including the availability of imprisonment for simple possession, was not valid legislation, either because it does not properly fall within Parliament's legislative competence, or because the prohibition, and in particular the availability of imprisonment, violate the guarantees of the *Canadian Charter of Rights and Freedoms*.

[18] Unfortunately for him, it establishes that incarceration is the very exception for such offence. At paragraph 4 of the decision, Justices Gonthier and Binnie, for the majority, said:

> A conviction for the possession of marihuana for personal use carries no mandatory minimum sentence. In practice, most first offenders are given a conditional discharge. Imprisonment is generally reserved for situations that also involve trafficking or hard drugs. Except in very exceptional circumstances, imprisonment for simple possession of marihuana would constitute a demonstrably unfit sentence and, if imposed, would rightly be set aside on appeal.

[19] They also said at paragraph 155 of the same decision:

> The reality is this. There is no impediment (such as a mandatory minimum sentence) to a trial judge imposing a fit sentence after a conviction for simple possession of marihuana. The "availability" of imprisonment in respect of the scheduled drugs under the NCA is part of a statutory framework for dealing with drugs generally and is not specifically directed at marihuana. The case law discloses that it is only in the presence of aggravating circumstances, not likely to be present in the situation of the "vulnerable persons" referred to by our colleague, where a court has been persuaded that imprisonment for simple possession of marihuana was, in the particular case, a fit sentence.

[20] In light of this Supreme Court decision and the circumstances of this case, it appears obvious to the court that the sentence of incarceration is unfit.

[21] In support of the proposal, the defence counsel made the suggestion in her additional submission to the court that the incarceration and its suspension by the court was submitted in order to parallel the effect of a conditional sentence of the *Criminal Code* that could be given by a civilian tribunal seating in criminal matters. It is important to say that a conditional sentence is similar to incarceration imposed to an offender but served in the community instead of being served in jail. To the contrary, the suspension of imprisonment or detention by a service tribunal does imply the full suspension of the carrying into effect of the incarceration. So, basically, the offender would not be submitted to any form of restriction to his liberty, contrary to what happen for a conditional sentence.

[22] Even in the civilian legal world, conditional sentence seems to bring more confusion than anything else, especially when talking about suspended sentence. At chapter XIV, section 14.10 of the book "Sentencing: a practitioner's guide", Gary R. Clewley and Paul G. McDermott say about conditional sentence:

> It will be difficult to argue that the twelve years of jurisprudence (1996 to 2008) developed in relation to conditional sentences can be borrowed to argue for a resurgence in the use of suspended sentences. In R. v. Proulx , the Supreme Court of Canada was at pains to draw a clear distinction between the two types of non-custodial sentences. In its effort at the time to champion the punitive effect of a conditional sentence, the Court carefully outlined the similarities between a conditional sentence and a "real" sentence of imprisonment. At the same time the unanimous Supreme Court of Canada emphasized how different the virtual imprisonment components of a conditional sentence were from the less restrictive aspects of a suspended sentence and probation. Accordingly, it will not be easy to argue that the experience with conditional sentences as a form of non-custodial disposition can be used to justify the imposition of a suspended sentence as an available non-custodial sentence.

[23] Additionally, there is no evidence that the offender would qualify for a conditional sentence. Each case is different and case law reveals that in the actual circumstances, the offender would not automatically get a conditional sentence in the circumstances of this case. Probably it would qualify for something lower than that.

[24] The proposal is also unreasonable. Incarceration is not the only way to deter people for committing such military offence, as it seems to be suggested in the joint submission. A severe reprimand, as it stands in the scale of punishment at section 139 of the National Defence Act, must be seen as a serious punishment in the military context. It is higher on the scale of punishment that a fine whatever the amount of the fine. It reflects that there is some reason to have doubts about somebody's commitment at the time of the offence and it reflects consideration given to the seriousness of the offence committed, but it also means that there is still hope for rehabilitation.

[25] Moreover, the circumstances of this case don't disclose in any way that incarceration would constitute the minimum necessary intervention that is adequate in the particular circumstances. To the contrary, such demonstration has been made for a sentence of a severe reprimand combined with a fine to the amount of 1,000$.

[26] Finally, imposing a sentence such as incarceration that would be so disproportionate to the offence committed and the specific circumstances of this case may bring such appearance of unfairness by this court martial that it would be contrary to the public interest and would bring the administration of justice into disrepute if the joint submission was accepted.

[27] In consequence, the Court will no accept in part the joint submission made by counsels to sentence you to the punishment of detention for a period of 14 days and a fine to the amount of 1,000$, considering that it would be unfit and unreasonable and will also be contrary to the public interest and would bring the administration of justice into disrepute.

[28] However, this court wants to reiterate the fact that the joint submission is partially accepted by this court. Because it departs partially from it does not mean that the process of plea-bargaining does not work at all. It is not an indication of disrespect of it by the court martial or by the military judges. I encourage and support counsel to continue to discuss matters in order to sort out any issues related to courts martial. It makes our military justice system efficient and effective when it is appropriately made.

[29] Therefore, the Court sentences you to a severe reprimand and a fine to the amount of 1,000$. The fine is to be paid in monthly installments of $100 each commencing on 1 May 2008 and continuing for the following 9 months. In the event you are released from the Canadian Forces for any reason before the fine is paid in full, the then outstanding unpaid amount is due and payable the day prior to your release.

[30] The proceedings of this Standing Court Martial in respect of Private Noah are terminated.

LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

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