Citation: *R. v. Private S.J.L.S. Bergeron,* 2008 CM 3018

Docket: 200802

STANDING COURT MARTIAL
CANADA
QUEBEC
VALCARTIER GARRISON

Date: 11 May 2008

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

HER MAJESTY THE QUEEN
(Prosecutor)
v.
PRIVATE J.L.S. BERGERON
(Offender)

SENTENCE
(Rendered orally)

OFFICIAL ENGLISH TRANSLATION

[1] On May 10, 2008, a panel of this Disciplinary Court Martial found Private Bergeron guilty of injurious or destructive handling of dangerous substances. It is my duty as the military judge presiding in this Court Martial to determine the sentence, as provided for in section 193 of the *National Defence Act*.

[2] The military justice system constitutes the ultimate means to enforce discipline in the Canadian Forces, which is a fundamental element of 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 Major Jean-Bruno Cloutier states in his thesis entitled AL=utilisation de l=article 129 de la *Loi sur la Défense nationale* dans le système de justice militaire canadien@,

> [TRANSLATION]
> Ultimately, to maximize a mission=s chances of success, the chain of command must be able to administer discipline in order to control

> misconduct that endangers good order, military effectiveness and, finally, the raison d=être of the organization, national security.

[4] The military justice system also ensures that public order is maintained and that persons charged under the Code of Service Discipline are punished in the same way as any other person living in Canada.

[5] It has long been acknowledged that the purpose of a separate system of military courts or of military justice is to permit the Canadian Forces to deal with matters relating to the Code of Service Discipline and the maintenance of the effectiveness and morale of the troops. That said, any punishment imposed by a court, whether military or civil, must be as lenient as possible in the circumstances. This principle is in accordance with the duty of the court to impose a punishment that is commensurate with the gravity of the offence and the previous character of the offender, as provided for in subparagraph 112.48(2)(*b*) of the QR&O.

[6] The Court has taken into consideration the recommendations made by counsel in light of the relevant facts, as presented at this trial, and their significance. It has also examined those recommendations in light of the principles of sentencing, including those set out in sections 718, 718.1 and 718.2 of the *Criminal Code* to the extent that they are not inconsistent with the sentencing scheme provided for under the *National Defence Act*. Those principles are as follows: first, protection of the public, and in this case the public includes the interests of the Canadian Forces; second, punishment of the offender; third, the deterrent effect of the sentence, not only for the offender but also for any person who might be tempted to commit such offences; fourth, separation, where necessary, of offenders from the rest of society, including members of the Canadian Forces; fifth, the imposition of sentences similar to those imposed on offenders for similar offences committed under similar circumstances; and sixth, the rehabilitation of the offender and reintegration of the offender into society. The Court has also taken into account the arguments made by counsel, including the case law filed and the documents introduced in evidence.

[7] The Court agrees with counsel for the prosecution that the need to protect the public requires the imposition of a sentence that emphasizes the specific and also the general deterrent effect. It is important to note that this requires that the sentence imposed not only deter the offender from reoffending but also deter any other person in a similar situation from engaging in the same unlawful acts.

[8] In the instant case, the Court is dealing with an offence of injurious or destructive handling of dangerous substances. This is a serious offence, but the Court intends to impose what it considers to be the minimum sentence applicable in the circumstances.

[9] In order to arrive at what it believes is a fair and appropriate sentence, the Court has also taken into account the following aggravating and mitigating circumstances.

[10] The Court considers the following to be aggravating factors:

a. First, the objective seriousness of the offence. You have been found guilty of an offence under section 127 of the *National Defence Act* for injurious or destructive handling of dangerous substances. This offence is liable toa maximum sentence of imprisonment for less than two years or a lesser sentence. This is an offence that, objectively speaking, is relatively serious;

b. Second, the subjective seriousness of the offence. You successfully received training concerning the throwing of C-13 grenades. In that context, it is clear that you were made aware of the high level of care and attention to be paid to such a device when it is being handled because of the potential danger of death or injury that it represented for you and the other persons within the effective radius of such a weapon. In other words, there was very little room for error, and you knew this; and

c. In view of the context that I have just described, the reckless disregard that you displayed is in itself an aggravating factor that the Court must consider.

[11] The Court considers the following to be mitigating factors:

a. The evidence heard during this trial does not indicate any other circumstance showing that the action you took goes beyond what is required in law to prove the essential element of negligence. Consequently, the Court concludes that the act you committed is at the bottom end of the scale of seriousness;

b. The fact that you have no conduct sheet or criminal record involving similar offences;

c. The fact that your actions did not have concrete and harmful consequences with respect to the people who were present at the firing range and that this was a single isolated act indicating uncharacteristic conduct on your part. Furthermore, it was not established that negligence in the handling of dangerous substances is a scourge or a problem within the Canadian Forces;

d. The fact that this incident occurred in a training context. This does not excuse your actions but indicates that you were in a period of learning your trade as a soldier, which means that you were not experienced at the time the offence was committed with respect to the handling of such a weapon. It may very well be that your level of discomfort in the handling of a real grenade was not at its highest level when you threw it at the firing range, which may appear quite normal in the circumstances despite the familiarization you had received earlier;

e. The complete lack of premeditation concerning the act that you committed;

f. Your age and your career potential within the Canadian Forces. At 21 years of age, you have many years before you to contribute positively to society in general as well as to the Canadian Forces;

g. The fact that corrective measures were taken immediately after the incident in order to minimize, through the imposition of additional training, the risk of your repeating such an act;

h. The fact that your chain of command at the time has tempted to issue a message to you concerning this incident, in particular by assigning you the duties, almost immediately after the offence was committed, of dispatch rider on duty throughout the weekend, that is, from Friday evening to Sunday evening;

i. The fact that you have had to face this Court Martial, which is announced and accessible to the public and that takes place in the presence of some of your colleagues and peers, has certainly had a very substantial deterrent effect on you and on them. The message is that this kind of conduct at a firing range will not be tolerated in any way and that conduct of this kind will be punished accordingly. In the context of the evidence heard, the Court is satisfied that you would not appear before another court for an offence of the same kind or of any other kind in the future;

j. The delay in dealing with this case. The Court does not wish to blame anyone in this case, but a sentence=s relevance and effectiveness in respect of the morale and cohesion of the members of the unit is proportional to the speed with which the discipline issue is resolved. The time elapsed since the incident occurred is one of the factors that makes it less appropriate to consider a more severe sentence carrying some deterrent effect.

[12] The Court finds it difficult to understand why it took nine months for the referring authority to refer this case to the Director of Military Prosecutions. At the very least and absent any explanation, it seems clear to this Court Martial that the highest disciplinary authority in the Land Force Quebec Area made very little of this case and possibly, to a certain extent, was negligent with respect to its duty to deal with this charge as expeditiously as the circumstances permit, as required by section 162 of the National Defence Act.

[13] Finally, I should like to explain that despite the suggestions of counsel that the Court impose different sentences in terms of seriousness, their respective suggestions included the fact that the offender should receive a punishment designed to rehabilitate him and reacquaint him with the habit of obedience within a structured military framework. He would accordingly have been subject to a training scheme that stressed the values and skills of the members of the Canadian Forces with a view to making him see what distinguishes him from the other members of society.

[14] In light of all the circumstances and the aggravating and mitigating factors identified by this Court, it seems clear that there is no need to subject the offender to such a rehabilitation scheme.

[15] As regards the imposition of a sentence of imprisonment for Private Bergeron, as mentioned in *R. v. Gladue*, [1999] 1 S.C.R. 688, at paragraphs 38 and 40, and confirmed by the Court Martial Appeal Court in *R. v. Baptista*, 2006 CMAC 1, a sentence of imprisonment must be imposed only in cases of last resort. Here, once again, given all the circumstances and the aggravating factors and mitigating factors identified by this Court, I do not see any reason that would justify depriving the offender of his freedom.

[16] A fair and equitable sentence must take into account the seriousness of the offence and the offender=s degree of responsibility in the specific circumstances of the case. Consequently, the Court is of the view that the imposition of a fine is in accordance with this principle in light of all the circumstances and the aggravating factors and mitigating factors identified by this Court. Stand up, Private Bergeron.

[17] The Court sentences you to a fine of $500. The fine must be paid in two consecutive monthly instalments of $250, the first instalment beginning on June 1, 2008. If, for any reason, you are discharged from the Canadian Forces before you have finished paying this fine, the total unpaid amount shall be paid prior to your discharge.

[18] The Court concludes that it is not desirable for the safety of the offender or that of others to make a prohibition order within the meaning of section 147.1 of the *National Defence Act*.

[19] The proceedings relating to the Disciplinary Court Martial of Private Bergeron are now concluded.

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

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