Citation: *R. v. ex-Private T.M. Gabriel*, 2008 CM 3006

Docket: 2007-72

STANDING COURT MARTIAL
CANADA
QUEBEC
LONGUE-POINTE GARRISON

Date: 25 March 2008

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

HER MAJESTY THE QUEEN
v.
EX-PRIVATE T.M. GABRIEL
(Offender)

SENTENCE
(Rendered orally)

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[1] Ex-Private Gabriel, having accepted and recorded a plea of guilty in respect of the first and third charge, the court finds you now guilty of those two charges. The court having granted leave to the prosecutor to withdraw the second charge in accordance with subsections 165.12 (2) and (3) of the *National Defence Act* before the reading of the charge sheet, the second charge has not to be considered by this court because it is not before it anymore.

[2] The military justice system constitutes the ultimate means 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, "[H]as 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 sentence you to a reprimand and a fine in the amount of $800.

[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 17 in its decision of *Private Taylor v. R*, 2008 CMAC 1, 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 interest 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. Here, the court is dealing with an offence of assault on C. M. and an offence of an act to the prejudice of good order and discipline involving harassment, contrary to the applicable Canadian Forces directives, also on C. M., in the context of a basic training course on St-Jean Garrison. They are very serious offences. However, the court will still impose what it considers to be the necessary minimum punishment in the circumstances.

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

[9] The court considers as aggravating:

> a. firstly, the objective seriousness of the offences. The first offence you were charged with was laid in accordance with section 130 of the *National Defence Act* for an assault contrary to section 266 of the *Criminal Code*. This offence is punishable by imprisonment for a term not exceeding five years or to less punishment. The third offence you were charge with was laid in accordance with subsection 129(2) of the *National Defence Act* for an act to the prejudice of good order and discipline for harassment contrary to the applicable DAOD in that matter. This offence is punishable by the dismissal with disgrace from Her Majesty's service or to less punishment. As I mentioned earlier, both offences are serious;
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> b. secondly, the subjective seriousness of the offences. The two offences you pleaded guilty to occurred on a military base during a Canadian Forces basic training course on which you and the victim were candidates. It constitutes a serious breach of trust committed among

your peers. If nobody has confidence in each other, how a mission could be achieved? Moreover, the victim was shocked and embarrassed by your continual and persistent demands, despite the fact she clearly indicated to you that she was not interested in socializing in a more intimate way with you in any manner. She feared for her physical integrity, and she was right, considering the assault you committed; and

c. finally, you acted in a repetitive manner and it took you a long time to realize that your unsolicited propositions to the victim were unwanted.

[10] 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 the Canadian community. It disclosed the fact that you are 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 did not have a conduct sheet or criminal record related to similar offences;

c. the facts and the circumstances of this case, including the fact that your acts did not result in any other regrettable consequences. So far, the court has no indication that what you did has had any permanent repercussions on the victim;

d. your financial situation and your plan concerning your education. It seems that you still want to be a valid asset for the Canadian community, as I said previously, and that you want to move on with your life. I encourage you to continue to do so; and

e. the delay to deal with this matter. The court does not want to blame anybody in this case, but the closest the disciplinary matter is dealt with, the more relevant and efficient is the punishment on the morale and the cohesion

> of the unit members. As one of the factors considered here, the time elapsed since the incident occurred makes it less relevant to give consideration to a stronger or higher punishment.

[11] Having said that, considering the factors and circumstances of this case, the court believes that the joint submission is not unreasonable.

[12] In consequence, the court will accept the joint submission made by counsel to sentence you to the punishment of a reprimand and a fine in the amount of $800, considering that it would not be contrary to the public interest and would not bring the administration of justice into disrepute.

[13] Ex-Private Gabriel, please stand up. Therefore, the court sentences you to the punishment of a reprimand and a fine in the amount of $800.

[14] The proceedings of this Standing Court Martial in respect of ex-Private Gabriel are terminated.

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

Counsel:

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