Citation: *R. v. Ex-Private M.A.D. Rozell*,2004 CM 59

Docket: S200459

STANDING COURT MARTIAL
CANADA
ALBERTA
BUILDING 626, LAND FORCES WESTERN TRAINING CENTRE WAINWRIGHT, DENWOOD

Date: 25 March 2004

PRESIDING: COLONEL K.S. CARTER, M.J.

HER MAJESTY THE QUEEN
v.
EX-PRIVATE M.A.D. ROZELL
(Accused)

SENTENCE
(Rendered Orally)

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[1] Ex-Private Rozell, the court will permit you to sit with your defence counsel while it explains to you the reasons for the sentence it has decided to impose. When it comes time for the court to impose the sentence, you will stand and the court will impose the sentence.

[2] Ex-Private Rozell, the court, having accepted and recorded your plea of guilty to the second and third charges on the charge sheet, now finds you guilty of those two charges. In determining an appropriate sentence, the court has considered the evidence it has received on the circumstances surrounding the commission of these offences, including the testimony of Captain Wilson, the evidence on your background and your current circumstances, as well as the submissions of counsel, which have been of great assistance to the court, and also the principles of sentencing.

[3] The court must, and does, follow certain principles in determining what is an appropriate sentence. These principles are applied, not only in courts martial, but also in criminal trials in Canada. They have been expressed in many ways, but in essence they include: protection of the public; punishment of the offender; deterrence, both general and specific; and reformation and rehabilitation. And as you might expect in a situation where the charges are charges of assault, protection of the public is a very

important consideration. The protection of the public encompasses both the general public interest, which includes, in the context of courts martial, the protection of the interests of the Canadian Forces, and the protection of individual members of the public, including Canadian Forces members.

[4] In the context of a court martial, the primary interest of the Canadian Forces is the maintenance or restoration of discipline. The fact that you are no longer a member of the Canadian Forces, ex-Private Rozell, does not mean that this court martial does not impact on discipline. You were a Canadian Forces member when these offences were committed, and their commission clearly impacted on your former unit and your colleagues. Discipline is a fundamental requirement of any military force and is a prerequisite for operational efficiency. Discipline has been described as willing and prompt obedience to lawful orders, and it has to be kept in mind that lawful orders may have a detrimental or even fatal consequence for members of the Canadian Forces.

[5] Nevertheless, their prompt and willing compliance is of fundamental importance, not only for the success of a mission, but for the safety and the well-being of other Canadian Forces members. True discipline is founded on mutual trust and respect, not only up and down the chain of command, but among service members. An efficient unit requires cohesion among its members which means that they must be able to trust and respect one another. Discipline, while a group quality or characteristic, is, in its final analysis, founded on personal choice. It's a personal quality; self-discipline. And this is something the Canadian Forces develops, encourages, and tries to maintain in its members.

[6] The court, in that regard, has considered very carefully the testimony of Captain Wilson, who has explained how this was done in the unit that you were at. And not surprisingly, it was done in much the same way as it is done throughout the Canadian Forces, through training, through example, and through practice so that compliance with lawful commands in the stressful and critical situations that Canadian Forces members are put into, such as disasters, deployments, and in combat, can be relied upon. In essence, members of the Canadian Forces do dangerous tasks and operate dangerous equipment and must obey the rules.

[7] The heart of discipline is not unthinking action, but rather conscious, immediate, and automatic response developed through practice, but ultimately resting on choice. If discipline in an individual member fails, if it falls below an acceptable standard, then there may be recourse to counselling and other administrative measures to try and restore it. When necessary, when discipline appears to be breached, then disciplinary action may be taken in the form of summary trials or courts martial. This is done to restore discipline. And it appears, from the evidence before the court that all those measures have been taken in regard to yourself, ex-Private Rozell. Fortunately, in

the Regular and Reserve Force of approximately 80,000 members, there are 1500 summary trials a year, and less than 100 courts martial.

[8] I've spoken about the principles of sentencing which this court applies. The principle of punishment is self-explanatory. It is a consequence that society imposes for a breach of its laws. It is denunciation by society of misconduct. In some cases, though this is not the case here, a minimum punishment is imposed for the commission of certain offences. General deterrence is a principle that the sentence imposed should deter not only the offender from re-offending, but also others in similar situations from engaging, for whatever reason, from the same prohibited conduct. And the principle that applies to deter the offender, personally, from re-offending is called specific deterrence. That means that the sentence should deter you from re-offending, not just from committing the same offences or similar offences again, but from committing any offences again. In this regard, the court has considered, very carefully, your disciplinary and your criminal convictions. Reform and rehabilitation, though they are the last principles that I'm listing, are of importance. When reformation and rehabilitation appear to be viable options, then they are things that must be weighed by any court in its consideration of a suitable punishment. This is because, ultimately, society is only protected through an individual reforming and rehabilitating him or herself.

[9] Like discipline, reformation and rehabilitation are individual choices. Society can facilitate the choice by both positive and negative incentives, but only the individual can make the necessary choices and take the necessary action. In that regard, the clear indication that the consumption of alcohol was a factor in one of these offences, and the indication that it was subsequently a problem, even after a participation in a rehabilitation course, causes this court to be realistic in its appreciation of effective reform and rehabilitation in the near future.

[10] In addition, there are other important considerations that the court must and has taken into account. One is proportionality, which, on the one hand, argues that sentences for similar offences by similar offenders committed in similar circumstances should not be significantly different. On the other hand, the principle of proportionality requires, as does QR&O 112.48, that any sentence take into account not only the nature of the offence, but also the background; that is, the previous character of the convicted person. QR&O 112.48 also requires that this court take into account any direct or indirect consequences of any finding, and, what is more applicable here, of any sentence that it imposes.

[11] In that regard, the court has assessed, very carefully, the roles of yourself, ex-Private Adams, and ex-Private Augustynek in the assault of Private Lavallie as they have been set out, as well as your respective backgrounds and current circumstances. I have, in determining the sentence in this case, also been guided by the sentencing

principles set out in the Criminal Code in sections 718 through 718.2. And I've considered the Supreme Court of Canada case of R. v. Gladue, [1999] 1 S.C.R. 688, where the Supreme Court makes clear incarceration is a punishment of last resort. The Court Martial Appeal Court has echoed that message in a number of recent cases.

[12] The court, after considering the nature of the offences; that is, assault, has decided that the predominant principle to be applied, as both counsel have submitted, is deterrence, both specific and general. The court has also considered as applicable, but subordinate to this main principle, reform and rehabilitation within the limits that it has outlined above. The evidence before the court with regard to the gravity of the offences and the circumstances surrounding their commission is set out in the Statement of Circumstances.

[13] What that sets out is a situation of two assaults, the first one on the 18th of January, 2003. While you were awaiting training in Shilo, you and two colleagues, ex-Private Adams and ex-Private Augustynek, went into a common room of the barracks block to report to the Duty Private, Private Lavallie. He was in uniform, and, as explained by Captain Wilson, was, by reason of his appointment, a representative of authority, and a representative of the chain of command in quarters with some authority over you. This was a rotating position with specific duties and responsibilities which you yourself understood because you yourself would have had to have done that job. You and your two colleagues were intoxicated. You and Private Lavallie had a disagreement, apparently something that was instigated by ex-Private Adams, and you assaulted Private Lavallie, punching him on the side of his head, and also punching him after he fell to the ground. The assault had to be stopped by others.

[14] You subsequently went to a washroom where Private Lavallie was trying to clean himself up after the incident, where you spoke to Private Lavallie, and afterwards both of you shook hands. However, the court notes at the same time, in evidence before it, that this was not simply an apology or reconciliation, as the Statement of Circumstances make it clear that Private Lavallie had to be assisted by others to make his way out of the washroom while you, ex-Private Adams, and ex-Private Augustynek followed him. And ex-Private Augustynek assaulted him, again, at that time. The injuries he suffered were bruising to his face, difficulty with his vision, and his glasses were knocked off during the initial assault and broken.

[15] A little over two months later, you and ex-Private Augustynek were in the smoking area outside building L142 in Shilo. There, after arguing with an intoxicated Private Garland, you pushed or tripped him down a set of five concrete steps and went to where he was and punched him in the face a number of times. Private Garland suffered various transitory injuries to his face. You apologized to Private Garland the next day. There is no indication before the court that you were intoxicated during this incident. So in essence, the court has before it two incidences; one involved

a colleague, and one involved a colleague who was also a person in a position of authority. And they both followed a very similar pattern; you were having a disagreement with somebody, and after the disagreement you started to punch people in the head.

[16] Now, the court has also considered carefully the context of these incidents. And this context is based on the documents that it has received, the testimony of Captain Wilson, and also the submissions of your counsel. You are 24 years old. The documents before the court indicate you completed some Reserve training in August of 2000. You joined the Regular Force on the 11th of September, 2001, in Charlottetown, and began as a Naval Electronics Technician, but at some time in 2002, transferred to the Artillery. The court has noted, on the Personnel Record Résumé, that you are listed as single rather than in a common law relationship. However, the court accepts that you are currently in a common law relationship. From the 7th of October to the 12th of December, 2002, you completed a basic soldiering course where you performed in an average manner. Your course report, however, notes that your off-duty conduct caused problems, and this was confirmed by Captain Wilson.

[17] In November 2002, you had a problem while operating a vehicle and were charged with a driving related offence in the civilian world. You were also absent without leave for 13 hours, thereby missing the deployment on a major exercise. This was characterized as an unusual situation by Captain Wilson and unique among the hundreds of recruits that he has supervised on training in Shilo. It could be said, from the course report, that you are at your best while under constant supervision. Unfortunately, it appears, after the 12th of December, 2002, constant supervision could no longer be provided and some reliance had to be placed on you personally to act responsibly. Concurrently, at this time, your alcohol problem was identified and you were counselled with regard to misuse of alcohol and referred for medical assessment for this problem.

[18] On the 10th of January, you—and that is the 10th of January, 2003—you were tried summarily for your 13 hours absence without leave on the 30th of November, 2002, and sentenced to a $200 fine. One day later, you were absent without leave for 29 minutes. The following day, you were absent without leave for 12 minutes. Six days later, you, ex-Private Adams, and ex-Private Augustynek assaulted the Duty Private. That same day; that is, the 18th of January, though not known to you until the following day, a colleague was killed in a fatal accident in a vehicle which another colleague was driving. As a result of the assault on the Duty Private, the accident, and two or three other incidents, significant re-evaluation of supervision in quarters occurred and steps were taken to involve duty staff at a higher rank on a permanent basis.

[19] The approach of treating people as self-disciplined adults was accepted, apparently, as an approach that would not work, and close supervision and vigilant

application of disciplinary measures was adopted. During the time from February 2000—during the time frame February 2002, apparently several people came forward to indicate their discomfort, and I use the word that Captain Wilson used, about your presence and activities in the barracks blocks. During this same time frame, the assault on Private Lavallie came to light and was investigated. Concurrently, on the 11th of February, 2003, you were counselled by Captain Wilson on abuse of alcohol.

[20] The court would, at this point in time, point out that barracks is, in essence, a communal residence. It is a place where soldiers are socialized. It is a place where they share rooms; bathrooms, common rooms, living rooms, kitchens. In essence, it's their home, their permanent residence, and the court has taken into account that these incidents occurred in barracks.

[21] On the 27th of February, 2003, you were tried for two absences without leave, the ones that occurred in January, and you were sentenced, at a second summary trial, to a $400 fine and 14 days' confinement to barracks. In essence, that meant you were confined to barracks from the 27th of February until the 12th of March, 2003. Confinement to barracks is a procedure that involves rigid supervision; that is, again, you were under constant supervision. The following week you were charged in the Lavallie assault. The week after that, you assaulted Private Garland. The day following the assault on Private Garland, you were put on Recorded Warning for alcohol misuse. At that time, apparently, a decision was made to separate you, ex-Private Adams, and ex-Private Augustynek, and also to separate you from your barracks mates.

[22] Three weeks after the Recorded Warning for alcohol misuse you were not allowed to get on a bus to take you to Wainwright because the bus driver assessed that you were intoxicated. Instead, you departed the following day. On the 5th of May, 2003, you attended a 28-day residential alcohol rehabilitation course. On the 4th of September, 2003, you were convicted of public mischief and sentenced to one years' probation, which you are still currently serving. The court concludes that this is an incident which occurred in Shilo as the address on Exhibit 4 is a Shilo address, even though the evidence before the court is that you were in Wainwright at this time.

[23] On the 21st of September, 2003, while you were released on conditions, you breached your undertaking not to consume alcohol. On the 2nd of October, 2003, you pleaded guilty and were sentenced to a $5,000 fine and a $75 victim surcharge. It appears, from Exhibit 5, that $175 of this amount was still owing on the 26th of January, 2004. Between June 2003, that is the completion of the alcohol rehabilitation course, and your release on the 10th of October, 2003, you apparently participated in no additional training in the Canadian Forces. From the 10th of October, 2003, until this date, you have worked, from time to time, in labouring positions.

[24] You are currently living in Charlottetown in a common law relationship and you hope to attend a technical training course commencing at Holland College in September 2004. This, apparently, is dependant on a number of factors including successfully writing an exam on the 30th of March, 2004, which is a prerequisite to be considered for admission.

[25] The court, in looking at this context, has considered, very carefully, your military and your civilian convictions which distinguish you from your two co-accused in the Lavallie matter, ex-Private Adams and ex-Private Augustynek. The court has also considered that various tribunals have applied fines, confinement to barracks, and probation, and all of these options have been used without noticeable deterrent effect. You are not before this court as a first offender. The court, however, does take into account you have had no convictions since the 21st of September, 2003, incident.

[26] The prosecution, in its submissions, summarized the purpose of discipline and submitted that this is a situation where the offences go to the heart of discipline and should be seen, at least in one case, as a challenge to authority. In both cases, the prosecution submits, these are attacks on the rights and dignity of colleagues, and their submission is that general and specific deterrence are the primary considerations here. The prosecution listed as aggravating factors your intoxication during the Lavallie assault, the fact that the victims were fellow soldiers, the fact that the attacks could be seen as, certainly in the case of Private Lavallie, a cowardly and embarrassing attack, that you have a conduct sheet and a criminal record, and that, in essence, these offences were committed at a time and as part of a course of conduct that demonstrated you could not learn from your mistakes and you could not take advantage of opportunities for assistance that were offered to you.

[27] As mitigating factors, the prosecution submitted your guilty plea, the delay that has been occasioned in bringing this matter before the court, and your relative youthfulness, and the court would note that you were 22 and 23 at the time of these offences. I will not review the cases mentioned by the prosecution because I will do that in a few moments, but the prosecution submits that ex-Private Adams was much less involved on the facts in the Lavallie assault than you were, even though he was an instigator. The prosecution submits that an appropriate punishment is 60 days' imprisonment.

[28] Your defence counsel made a number of submissions in addition to providing information to this court. And she submitted that, in essence, release, while it is not a punishment, is the ultimate general deterrence, and that has been done here. Your counsel has also stressed that there have been negative family consequences to you from your release from the Canadian Forces. She has stressed the delay in this matter, and the fact that it has been hanging over your head since your release in October 2003,

and that it was not confirmed to you until January 2004 that these matters would go forward; that is, these charges were not preferred until that time.

[29] As mitigating factors, she has stressed your youth, your course report, the fact that you have the potential to become a contributing member of society—and in that regard she has highlighted your application to Holland College—the fact you are in a stable common law relationship, your release, and also the fact that you shook hands with one of the victims afterwards and apologized to another after these assaults. Your counsel, with a great deal of credibility, said that one of the difficulties that exists is there is not anything in evidence to show you have learned a lot from your experiences to date. Your counsel has stressed, very heavily, the issue of proportionality with ex-Private Adams and ex-Private Augustynek. She has suggested, that given your current financial circumstances, that a fine is not a particularly viable option in this matter, and has indicated that although 14 to 30 days' imprisonment is appropriate, that she would ask the court to suspend that and to give you one further chance.

[30] Now, I will briefly review the cases that have been referred to the court in this matter, and the first one I will mention is at Tab 4, Vansen, of the materials. This is a court martial of Vansen and Winkler. The court would say that that is a situation where there was a more serious assault and more serious consequences. And the situation was one where there were pleas of guilty and the two accused were sentenced to a period of incarceration, which was suspended, and a very large fine. With the Keenan case, the court would say that it found, that with both that case and the Greene case, that these were relatively old cases and were not of particular use to the court. The court found more useful the cases of McMullin and the case that's already been mentioned, that of Vansen and Winkler.

[31] And what, essentially, that does is it establishes a range of appropriate punishments. That range runs from a period of imprisonment, and the upper levels, the court would say the prosecution is correct, 60 days, through to a large fine and reprimand. But in each and every case it is clear that the circumstances of the offence and the circumstances of the offender are very significant factors. The court has taken into consideration in mitigation in this matter your guilty pleas. It has also taken into account as mitigation that your shaking hands and apologizing are some expressions of remorse made at the time of the incidents. The court has taken into account as quite significant the delay in this matter and the impact of that delay on you. And the court has taken into account that there is no evidence before it that any physical damage was of a permanent nature.

[32] In terms of aggravating factors, the court has taken into account that there are two offences here, both of which are offences of violence, and both of which clearly impacted on the comfort and security levels of your barracks mates. The court has taken into account your conduct sheet and the other material before it about your

criminal convictions. The court has also taken into account that, in essence, there is a course of conduct here. When the court looks at what happened between January and the end of March and beginning of April of 2003, there were many opportunities where you were either offered assistance or were shown negative consequences of your actions, and neither of those approaches, neither of them, resulted in you learning from your errors.

[33] The court has to say, it will take into account your age, but that age 23 is not the age of a teenager. There's a certain amount of maturity that is expected from someone who is 23. In terms of proportionality, the court has reviewed the respective roles in the Lavallie matter and the court finds that you were more responsible than either ex-Private Adams or ex-Private Augustynek, on the information in front of it, in the attack. Though the court would indicate that each of them hit the victim once and, clearly, they both encouraged and facilitated you in your actions. The court also takes into account that you have been charged with two assaults, not simply one assault. And the court takes into account the fact that, with the other offenders, they were before the court as a first offender. They did not have the history that you have in this matter, and they do not have a record of being fined, being confined to barracks, and being put on probation.

[34] The court has considered, very carefully, whether or not there is any alternative that it feels it can use to incarceration in order to appropriately sentence you. And the court would say it has come to the conclusion there is no other appropriate alternative in this matter. Neither the nature of the offences, nor the circumstances and the context and your previous character are such that the court can find there is a viable alternative. The court would also say your counsel has submitted that the purpose of military prison is to try and rehabilitate people and make them good soldiers. That is not the only purpose. The purpose of a military prison; that is, prison—imprisonment rather than a detention punishment, is also to help people rehabilitate into civilian life. There are a number of programmes that are available, such as alcohol counselling programmes, that exist in the military prison.

[35] The court has considered carefully the submission of the prosecution with regard to 60 days, and the court considers that excessive in this case. The court considers the fact that the delay in this matter has had a significant impact. It has had an impact on you, and the effect of that is to reduce, in the court's view, the period of incarceration that is necessary in this matter. The delay has also had, as your counsel has pointed out, an impact on the consequence of any punishment that you may undergo acting as a general deterrent; that is, the longer the delay in this matter, the less effective this is as a general deterrent.

[36] The court accepts you are in very difficult circumstances, financially, at the moment. But the court has not rejected entirely the concept of a fine, if it is a

reasonable fine, and one that could be combined with a short period of incarceration and which would give you an opportunity, after you had served your period of incarceration, to pay off on a reasonable basis; that is, the court accepts you cannot pay very much on a regular basis, but the court believes that a fine that would allow you, on a regular basis, to learn the consequences of what you do and remember the consequences would be beneficial. And by combining a fine with a period of incarceration, the court is satisfied it can minimize the period of incarceration necessary.

[37] The court has considered, very carefully, the potential impact of this on your education plans. But the court notes that March 30th is five days away, and in essence, what your counsel is essentially saying, is anything more than three days of incarceration would have an adverse impact on this. And the court is of the view that three days of incarceration is not sufficient in this matter. So the court has developed what it believes is the minimum punishment in these particular circumstances, taking into account particularly the delay, that will act as a general and specific deterrent for the two assaults that you committed on your colleagues.

[38] Ex-Private Rozell, please stand up. Ex-Private Rozell, the court sentences you to 14 days' imprisonment and a $1200 fine. This sentence was imposed at 1805 hours on the 25th of March, 2004. I am now going to adjourn these proceedings briefly, and I will allow you, Ms MacNaughton, to speak to your client about a number of issues, and I will just lay out those issues for you: One is time to pay, the second one is the issue of an application for release pending appeal; the third one is a weapons prohibition order; and the fourth matter is a DNA order. And with those last two matters, naturally, Major MacGregor, I will be seeking your submissions in that regard.

COLONEL K.S. CARTER, M.J.

Counsel:

Major B. MacGregor, Regional Military Prosecutions Western
Counsel for Her Majesty the Queen
Ms Patricia MacNaughton, Sproule MacNaughton, #101, 4076 48th Avenue, Red Deer, Alberta, T4N 6J4
Counsel for ex-Private M.A.D. Rozell