COURT MARTIAL

Citation: *R. v. Dupuis*, 2010 CM 3005

Date: 20100414
Docket: 200940

Standing Court Martial

Valcartier Garrison
Courcelette, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Private M. O. Dupuis, Offender

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

OFFICIAL ENGLISH TRANSLATION

REASONS FOR SENTENCING

[1] Private Dupuis, the Court Martial having accepted and recorded your admission of guilt on the first, second and third counts, the Court now finds you guilty on those three counts.

[2] As the military judge presiding at this Standing Court Martial, it now falls to me to determine the sentence.

[3] As Justice Gendreau wrote in *R. v. S.T.*, 2007 QCCA 1447 (CanLII) at paragraph 14, and I quote:

> [TRANSLATION]
> [14] Sentencing is without a doubt one of the most difficult and sensitive tasks that judges perform as part of their judicial duties. Finding and applying the most just and equitable standard for the accused while adequately conveying society's disapproval and protecting the public is a complex balancing exercise involving values which, although not contradictory, have different objectives.

[4] In the particular context of an armed force, the military justice system is the ultimate means of enforcing discipline, which is a fundamental element of military activity in the Canadian Forces. The purpose of this system is to prevent misconduct, or, more positively, promote good conduct. It is through discipline that an armed force ensures that its members will perform their missions successfully, confidently and reliably.

[5] The military justice system also ensures that public order is maintained and that those subject to the *Code of Service Discipline* are punished in the same way as any other person living in Canada.

[6] It has long been recognized that the purpose of a separate system of military justice or courts is to allow the Canadian Forces to deal with matters that pertain to the *Code of Service Discipline* and the maintenance of the effectiveness and morale of the troops. That being said, the punishment imposed by any court, military or civilian, should be the minimum necessary intervention that is adequate in the particular circumstances of the case. It also goes directly to the duty imposed on the Court to impose a sentence commensurate with the gravity of the offence and the previous character of the offender, as stated at subparagraph 112.48(2)(*b*) of the QR&O.

[7] In this case, the prosecution and defence counsel have presented a joint submission on sentencing. They have recommended that the Court sentence you to 30 days' imprisonment. They have also recommended that the Court suspend the execution of that sentence.

[8] The Court Martial is not bound by that recommendation. However, it is well established in the case law that there must be incontrovertible and compelling reasons for the Court to disregard it. It is also generally recognized that the Court should accept the recommendation unless doing so would be contrary to the public interest or bring the administration of justice into disrepute.

[9] The Court has taken into consideration the respective recommendations made by counsel in light of the relevant facts as they emerge from the summary of the circumstances. It has also considered the recommendation in light of the relevant sentencing principles, including those set out in sections 718, 718.1 and 718.2 of the *Criminal Code*, insofar as those principles are not incompatible with the sentencing regime provided under the *National Defence Act*. Those principles are as follows: first, protection of the public, and here 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 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 sentences imposed on offenders for similar offences committed in 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 they filed and the documents they introduced in evidence, and your testimony before the Court.

[10] The Court agrees with counsel for the prosecution that the need to protect the public requires the imposition of a sentence that emphasizes first general deterrence, followed by denunciation and rehabilitation of the offender. It is important to remember that the principle of general deterrence means that the sentence imposed should deter not only the offender from reoffending, but also others in similar situations from engaging in the same prohibited conduct.

[11] In this case, the Court is dealing with two offences of absence without leave and one offence of drunkenness. These are serious offences, but the Court will impose what it considers to be the minimum sentence applicable in the circumstances.

[12] The courts are sensitive this type of offence. In a military context, such offences have an impact on unit cohesion and morale, since they concern the principles of responsibility and integrity which all Canadian Force members must honour. To ensure the success of any mission, an armed force must be able to count on a crucial element: the reliability and trustworthiness of military members, in all circumstances and at all times.

[13] In arriving at what it considers to be a fair and appropriate sentence, the Court has also considered the following aggravating and mitigating factors.

[14] With regard to the aggravating factors:

> First, the objective seriousness of the offence. You have been found guilty of two offences under section 90 of the *National Defence Act* for absence without leave, the first time for a period of 50 hours and the second time for two months. This offence is punishable by imprisonment for less than two years or less punishment. You have also been found guilty of an offence under section 97 of the *National Defence Act* for having been drunk. This offence is punishable by imprisonment for a term not exceeding 90 days or less punishment.
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> Second, the subjective seriousness of the offence. Your extended absences undermined the proper operation of the platoon to which you were assigned, the company and, ultimately, the regiment to which you belonged. It fell to your peers to shoulder the burden of the duties you were unable to perform because of your extended absence.
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> The fact that you committed the offence of absence without leave repeatedly and the duration of each of your absences also showed that you had no regard for the impact and consequences of your absence on your regiment and your colleagues. Essentially, you lost all respect for authority and your peers.
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> Furthermore, not only did you fail to report for duty as required, you managed to be unfit to perform your duties during the day by being drunk.
>
> Last, your conduct sheet shows that these are not your first offences of absence without leave and that despite having been sentenced to detention by the officer who conducted your summary trial, you demonstrated by your actions that you

had failed to grasp clearly the message you were sent in terms of disciplinary conduct.

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

Your plea of guilty is clearly a sign that you are remorseful and are sincere in your intention to remain a valid asset to Canadian society. Furthermore, in your testimony before the Court, you clearly showed remorse for the consequences of your actions.

Your age and your career potential as a member of the Canadian community; being 23 years old, you have many years ahead to contribute positively to Canadian society.

Your sincere desire and sustained efforts to amend your ways. Whereas 2008 was a very poor year for you on the disciplinary front, 2009 was a serious starting point for your rehabilitation. Through your concerted efforts, you sought to understand what was happening to you and to submit to everything necessary to reintegrate properly into Canadian society. It is very clear to me that you were affected by post-traumatic stress disorder, as shown in the evidence you submitted to the Court, and that you are having great difficulty readapting to the pace and environment of civilian life in Canada because of your experiences in the operational theatre in Afghanistan.

However, you took the necessary steps to reach your goal and I have to say that I admire your determination and the courage you have shown to this day to deal with that disorder. You succeeded in understanding that you could not cope with it alone, but that with adapted support and adequate care, you would have the chance of returning to nearly normal life. You have accepted medication and therapy, and that is already a major step in your rehabilitation. I encourage you to continue to make strides in that direction and persevere in your fight to pull through.

Even though you were released, you decided to continue your therapy with the goal of taking back control of your life. You plan to return to school or work and you have clearly conveyed to the Court your ambitions in that regard.

The fact that you had to face this Court Martial, which was announced and accessible to the public and which took place in the presence of some of your colleagues, has no doubt had a very significant deterrent effect on you and on them. The message is that the kind of conduct that you displayed will not be tolerated in any way and will be dealt with accordingly.

Your release from the Canadian Forces under Item 5(*f*). Even though that does not constitute a sentence in and of itself, it is important to understand that your release from the Canadian Forces was an administrative sanction for your conduct underlying the offences of which you have been found guilty or your

> past offences. Your exclusion from the Canadian Forces sends a clear deterrent message to all members that such conduct can lead to this kind of consequence.

[16] Regarding the imposition of a sentence of imprisonment by this Court on Private Dupuis, the Supreme Court of Canada established in *R. v. Gladue*, [1999] 1 S.C.R. 688, at paragraphs 38 and 40, that imprisonment should be the penal sanction of last resort. The Supreme Court noted that incarceration in the form of imprisonment is appropriate only where no other sanction or combination of sanctions is appropriate for the offence and the offender. This Court feels that these principles are relevant in the context of military justice, taking into account, nonetheless, the important differences between the sentencing rules that apply to a civilian court hearing a criminal or penal case and the rules that apply to a military court whose powers of punishment are set out in the *National Defence Act*.

[17] Moreover, this approach was reaffirmed by the Court Martial Appeal Court in *R. v. Baptista*, 2006 CMAC 1, at paragraphs 5 and 6, in which it held that imprisonment should be considered only as a last resort.

[18] The civilian criminal justice system has its own unique features, such as a conditional sentence, which differs from probationary measures but is nonetheless a genuine prison sentence applied according to different terms and allows the offender to serve his or her custodial sentence in the community, where it is possible to combine the punitive and corrective objectives, as indicated by the Supreme Court in *Proulx*. The military justice system, however, has disciplinary tools such as detention, which seeks to rehabilitate service detainees and re-instil in them the habit of obedience in a military framework organized around the values and skills unique to members of the Canadian Forces. Detention can have a significant effect in terms of denunciation and deterrence, while at the same time not stigmatizing service detainees to the same degree as members of the military who are sentenced to imprisonment, as stated in the Notes added to articles 104.04 and 104.09 of the QR&O.

[19] However, in the case of a member of the Canadian Forces who has already been released, the objectives of a sentence of detention are no longer relevant, and the remaining form of incarceration specified in the scale of punishments, which is imprisonment, must be considered.

[20] In this case, the three offences for which the offender has pleaded guilty are purely disciplinary in nature. However, their number and seriousness, together with the record of similar offences and the sentences that were imposed, may justify a sentence of incarceration. For these reasons, it seems clear to this Court that incarceration in the form of imprisonment is the only appropriate sanction and that there is no other sanction or combination of sanctions that is appropriate for the offences and the offender.

[21] However, the Court is also of the view that it has been established, owing to the serious efforts made by the offender to date to rehabilitate himself and the real possibility that all of his efforts to reintegrate himself into civilian life in Canadian society may come to nothing if he has to serve the sentence of incarceration, that there

are exceptional circumstances in this case warranting the suspension of this sentence of incarceration.

[22] A review of the case law of military and civilian courts regarding sentencing for an offence of a similar nature in similar circumstances leads me to conclude that a sentence of incarceration is reasonable in the circumstances. Moreover, regarding the term, I do not think that a long prison sentence, such as of 90 days or more, should be applied in the circumstances. Therefore, counsel's joint submission that the Court impose a sentence of imprisonment for a term of 30 days is reasonable in my view, given the context of this case.

[23] A just and equitable sentence should take into account the seriousness of the offence and the offender's degree of responsibility in the particular circumstances of the case. Therefore, considering that no other sanction or combination of sanctions is appropriate to the offence and the offender in this case, the Court is of the opinion that the joint submission is reasonable in the circumstances. Accordingly, it will accept the recommendation made by counsel to sentence you to imprisonment for a term of 30 days, considering that this sentence is not contrary to the public interest and would not bring the administration of justice into disrepute.

[24] Private Dupuis, stand up. The Court sentences you to 30 days' imprisonment and suspends the execution of that sentence.

[25] The proceedings relating to the Standing Court Martial of Private Dupuis are now concluded.

Counsel:

Major St-Amant, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Major É. Charland, Directorate of Defence Counsel Services
Defence counsel for ex-Private Dupuis