

Citation: *R. v. Private S.C. Foo*, 2010 CM 3002

Docket: 200950

**STANDING COURT MARTIAL
CANADA
ONTARIO
LAND FORCE CENTRAL AREA TRAINING CENTRE MEAFORD**

Date: 14 January 2010

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

HER MAJESTY THE QUEEN

v.

**PRIVATE S.C. FOO
(Offender)**

**SENTENCE
(Rendered Orally)**

[1] Private Foo, please stand up. Private Foo, having accepted and recorded a plea of guilty in respect of the first and second charge on the charge sheet, the court finds you now guilty of both charges. Please be seated.

[2] It is now my duty as the military judge who is presiding at this Standing Court Martial to determine the sentence. 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.

[3] It is through discipline that an armed force ensures that its members will accomplish, in a trusty and reliable manner, successful missions. It 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.

[5] 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 directly goes to the duty imposed to the court to:

"[I]mpose a sentence commensurate with the gravity of the offence and the previous character of the offender."

as stated at QR&O article 112.48(2)(b).

[6] Here, in this case, the prosecutor and the offender's defence counsel made a joint submission on the principles of sentencing to be imposed by the court. They recommended that this court sentence you to a reprimand and a fine; however, they differed on the quantum of the fine to be imposed. The prosecutor suggested a fine to the amount of \$2,500, and your counsel is of the opinion that the amount of \$1,000 would meet the justice requirements. 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 the decision of *R. v. Sinclair* at paragraph 17, that:

(2) 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.

[7] The court has considered the joint submission in light of the relevant facts set out in the Statement of Circumstances 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;

Secondly, the punishment of the offender;

Thirdly, the deterrent effect of the punishment, not only on the offender, but also upon others who might be tempted to commit such offences;

Fourthly, the reformation and the rehabilitation of the offender;

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 and the documentation introduced.

[8] I must say that the protection of the public must be answered by a sentence that would emphasize the principles of denunciation 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 reason, in the same prohibited conduct.

[9] Here, the court is dealing with two specific military offences, one for behaving in a disgraceful manner and the other one for drunkenness. Both offences involve Canadian Forces principles such as respect the dignity of all persons. The lack of respect for dignity of persons by Canadian Forces' members, especially towards peers, is a serious matter and may reflect on the trustworthy relationship and the reliability that must exist at all times among armed forces' members when performing any task or mission. However, the court will impose what it considers to be the necessary minimum punishment in the circumstances.

[10] I must add that at first I had some difficulty in seeing the particulars of the first charge and that I was not convinced that it disclosed a service offence. However, the Statement of Circumstances and the answers provided by both counsel clearly explained that it is because of the manner you behaved that very night in order to have sexual relations with the complainant that made this offence as it was laid. Going in the private quarters of people from your platoon on a military establishment at night without their consent and getting on a female fellow soldier to see if she would consent to sexual relations in the presence of another fellow soldier is shocking and unacceptable behaviour for any trustworthy and reliable average soldier in the Canadian Forces. The profession of arms cannot tolerate such conduct, which reflects discredit on it, but also on the Canadian Forces.

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

[12] The court considers as aggravating:

The objective seriousness of the offences. The first offence you were charged with was laid in accordance with section 93 of the *National Defence Act* for behaving in a disgraceful manner, and it is punishable by imprisonment for a term for less than five years or to less punishment; the second offence you were charged with was laid in accordance with

section 97 of the *National Defence Act* for drunkenness. This offence is punishable by detention for a term not exceeding 90 days or to less punishment.

About the subjective seriousness of the offences, the court considered three things as aggravating factors. First, the breach of trust. As I said earlier, the success of a mission depends essentially on the degree of trustworthiness that exists among soldiers, male and female. Their lives may depend on that factor, and if it does not exist in a platoon, it may affect any larger group than that. You acted in a totally disrespectful manner towards a fellow female soldier. You totally disregarded the physical and psychological integrity that belongs to each individual in our Canadian society. And you took advantage of her vulnerable situation while she was asleep in a room that she was sharing with other soldiers to try to get what you wanted, which was sexual gratification.

Moreover, you did not pay any attention and did not give any consideration to the way you were dressed while going to the mess in the manner you acted. Going and accessing a public place, such as a mess, dressed with a t-shirt, shorts, and running shoes, during winter time and really intoxicated, made it clear that it was through the effects of alcohol that you acted in such a disorderly way. You could have waited the morning after, properly dressed, to go there in order to try and find your cellular phone, but you did not.

Second, you were told to leave the room of the complainant, which you did, but you also gave some thought to what you really wanted to do before returning in the room for a second time and doing it. Such behaviour disclosed clearly some premeditation before committing the first offence you were charged with.

Finally, your conduct towards the complainant concerning the first offence had clearly some impact on her and still has some today. Your actions clearly contributed to her fear for her security she still has today and on her ability to trust others.

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

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 Forces and the Canadian community. It disclosed the fact that you're taking full responsibility for what you did. In addition, you clearly

realized right away that what you did was wrong, and by trying to apologize, you also clearly disclosed your sincere remorse at that time for what you did.

Your age and your career potential as a member of the Canadian Forces. Being 22 years old, you have many years ahead to contribute positively to the society in general as well as in the Canadian Forces.

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

The fact that it is an isolated incident and that no such similar conduct occurred after the commission of the offences.

The fact that you were put under counselling and probation for a period of six months immediately further to the incident. I recognize clearly that this administrative measure does 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.

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.

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

[15] Concerning the amount of the fine, the court considers that the amount suggested by the prosecutor would meet the required sentencing principles and objectives, such as denunciation and general deterrence, as well as maintaining discipline and confidence in the administration of military justice.

[16] Private Foo, please stand up. Therefore, the court sentences you to a reprimand and a fine to the amount of \$2,500. The fine is to be paid in monthly installments of \$250 each commencing on 1 February 2010 and continuing for the following nine months. In the event you are released from the Canadian Forces for any reason before the fine is paid in full, then the outstanding unpaid amount is due and payable the day prior to your release.

[17] The proceedings of this Standing Court Martial in respect of Private Foo are terminated.

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

COUNSEL

Captain T.E.K. Fitzgerald, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Lieutenant-Commander J.A. McMunagle, Directorate of Defence Counsel Services
Counsel for Private S.C. Foo