Citation: *R. v. ex-Private J.A. Kinchen*, 2004 CM 43

Docket: S200443

STANDING COURT MARTIAL
CANADA
MANITOBA
CANADIAN FORCES BASE SHILO

Date: 16 November 2004

PRESIDING: LIEUTENANT-COLONEL M. DUTIL, M.J.

HER MAJESTY THE QUEEN
v.
EX-PRIVATE KINCHEN
(Accused)

SENTENCE
(Rendered verbally)

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[1] Ex-Private Kinchen, stand up, please. Having accepted and recorded a plea of guilty in respect of charge number one, this court finds you guilty of that charge. You may be seated now.

[2] 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 directly to discipline, efficiency and morale of the military. 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.

[3] In determining sentence today, the court has considered the totality of the circumstances surrounding the commission of the offence presented during the sentencing procedure as well as the documentary evidence filed with the court. The court considered also, for the purposes of the sentence, representations made by counsel and the case law provided to the court and the court has also considered any direct and indirect consequences that the finding and sentence will have on you and to some extent the direct and indirect consequences that these charges have had on your military career..

[4] The principles to be used in considering what should be an appropriate sentence generally relate to the following: firstly, the protection of the public and the public includes the interest 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; and fourthly, the reformation and rehabilitation of the offender.

[5] The prime principle is the protection of the public and the court must determine if that protection would be best achieved by deterrence, rehabilitation or punishment. In a case such as this one, where we are dealing with primary military good order and discipline, the primary interest of the Canadian Forces is the maintenance and the restoration of discipline. There is no doubt that any punishment imposed by a Court Martial for an offence related to an accused's breach of conditions that were imposed on him by a service tribunal as part of a lawful punishment must emphasize the principle of general deterrence. The court believes that denunciation is also a significant factor. In the particular circumstances of this case, where the offender is no longer a serving member of the Canadian Forces, there is no need to attach much importance to specific deterrence.

[6] In arriving at what the court considers to be a fair and appropriate sentence, the court has considered the following factors:

i) The objective gravity of this offence. An offence under section 129 of the *National Defence Act* is a serious offence;

ii) The particular context of this case as revealed by the Statement of Circumstances. Not only did you not obey to an order, but also this particular order was an integral part of a condition implicitly imposed by a service tribunal who had sentenced you for a service offence. This is a total disrespect not only to the chain of command, but to the rule of law. The court or this court somewhat differs with the opinion expressed by Chief Military Judge Carter in the Standing Court Martial of Ordinary Seaman Caza, where she stated at page 43 of the transcript:

"For this type of offence, the court would say the range does not in its view include detention, certainly not in this situation, but reprimands, fines, and minor punishments, including confinement to barracks are all options, and the court would point out that even though you have been released, confinement to barracks is an option."

With respect, this court finds that the non-compliance with orders, including orders that are in fact conditions imposed by a service tribunal as part of its punishment, demonstrates a profound and blatant disregard for military obedience and discipline. The punishment of detention is

specifically designed to rehabilitate service detainees by re-instilling in them the habit of obedience in a structured, military setting, through a regime of training that emphasizes the institutional values and skills that distinguish a member of the Canadian Forces from a civilian. This is not to say that detention should be imposed in this case, but the court would not rule out the propriety of such punishment in specific circumstances upon a specific offender;

iii) The fact that you have acknowledged responsibility for your actions by pleading guilty before this court, but also that you intended to do so at the earliest opportunity. The evidence before this court reveals that you elected to be tried by court martial because you wanted to defend yourself on a charge of Absence Without Leave, contrary to section 90 of the *National Defence Act*. According to Exhibit 8, that charge accompanied the charge you are facing today before this court but that charge was not preferred. Therefore, this court considers this admission of guilt as a genuine acknowledgement of your misconduct and it is a factor that I consider essential in the reformation and rehabilitation of any offender;

iv) the court considered also the rank you held at the time, also your age, as well as your current financial, economic, social and family situation, including the fact that you make support payments for your young child. Your defence counsel emphasized that you are now paid at an hourly rate of $10 and therefore in a more precarious situation today to that you previously enjoyed during your service. That is a fact. The evidence before this court however reveals that your engagement was not renewed due to the excessive administrative and disciplinary issues involved. In some respects, you are ultimately responsible for this radical change, which may or may not be temporary;

v) the court considered also your previous conduct sheet. The nature of the charges and their frequency seems to indicate that you had serious difficulties with basic military discipline. It may be that military life was not for you and you may be embarking on a very interesting and challenging new career. But, as stated by the prosecution, this is a case where general deterrence must be emphasized and where, obviously, prosecutorial authorities felt, in the lawful exercise of their discretion, that there was a public interest in this specific case. This is not the role of this court to fetter with that discretion.

[7] Counsel for the defence compared this case to the breach of a condition or a breach of probation where civil courts would sentence an offender to a discharge, absolute or conditional. The defence did not provide the court with any case law to

support its argument. Counsel invited this court, using that analogy, to consider a caution as being an appropriate punishment in these circumstances. First, this court is not convinced that a discharge is the most appropriate punishment in cases where offenders breach their probation orders or, in more serious cases, where they do not respect the conditions imposed on them when they are serving a conditional sentence. However, this court is convinced that a caution is not an appropriate punishment in this case where it has been accepted that general deterrence is the prime sentencing principle. The prosecution has recommended that this court impose a fine in the amount of $250. The defence argued that the prosecution's recommendation was not unreasonable but recommended that the fine should not be in excess of $100 as the offender lost a day at work for showing up at his court martial which is worth approximately $80. In determining sentence, the court has taken into consideration that fact, but this court does not find it to be significant in terms of mitigation.

[8] This court finds that the recommendation made by the prosecution is very lenient in the circumstances of this case. Should you have not already been released from the Canadian Forces and still struggling with the values and the requirements for military discipline, this court would have seriously considered sentencing you to a short period of detention as it is oriented mostly towards specific deterrence and rehabilitation of an offender. That is not necessary here.

[9] For all these reasons, this court sentences you to a fine in the amount of $250 payable in two equal payments of $125. The first payment will be payable by certified cheque or money order to the Receiver General for Canada no later than 18 November 2004. The second payment, also by certified cheque or money order, will be payable no later than 18 December 2004. These payments will be sent by registered mail to:

National Defence Headquarters
Director of Law, Claims and Civil Litigation
10th Floor, Constitution Building
305 Rideau Street
Ottawa, Ontario
K1A OK2

[10] The proceedings of this court martial in respect of ex-Private Kinchen are terminated.

LIEUTENANT-COLONEL M. DUTIL, M.J.

Counsel:

Captain A.J.L. Troisfontaines, Deputy Judge Advocate, Assistant Judge Advocate General, 1 CAD Winnipeg
Assistant Attorney for Her Majesty The Queen
Captain K.A. Reichert , Regional Military Prosecutor, Western Region
Attorney for Her Majesty The Queen
Lieutenant(N) K. Osborne, Director of Law/Administrative Law
Assistant Attorney for ex-Private J.A. Kinchen
Major C.E. Thomas, Directorate of Defence Counsel Services
Attorney for ex-Private J.A. Kinchen