COURT MARTIAL

Citation: *R. v. Elliott*, 2010 CM 3019

Date: 20100824
Docket: 201034

Standing Court Martial

Canadian Forces Base Shilo
Shilo, Manitoba, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal W.J. Elliott, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Master Corporal Elliott, having accepted and recorded a plea of guilty in respect of the second charge on the charge sheet, the court now finds you guilty of this charge. Considering that the first charge was withdrawn by prosecution at the beginning of this trial, then the court has no other charge to deal with.

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

[3] The military justice system constitutes the ultimate mean 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 trusting 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 tribunal 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 the 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 to the gravity of the offence and the previous character of the offender," as stated at QR&O 112.48 (2)(*b*).

[5] Here in this case, the prosecutor and the offender's defence counsel made a joint submission on sentence to be imposed by the court. They recommended that this court sentences you to detention for a period of ten days and a fine in the amount of 5,000 dollars in order to meet justice requirements.

[6] Although this court is not bound by this joint recommendation, it is generally accepted that a court should not depart from it unless it has cogent reasons such as it 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:

a. firstly, the protection of the public and the public includes the interest of the Canadian Forces;

b. secondly, the punishment of the offender;

c. thirdly, the deterrent effect of the punishment, not only on the offender, but also upon others who might be tempted to commit such offence;

d. fourthly, the reformation and the rehabilitation of the offender;

e. fifthly, the proportionality to the gravity of the offence and the degree of responsibility of the offender; and

f. 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 and the testimony of the offender and Major Lunney.

[8] I must say that the protection of the public must be ensured by a sentence that would emphasize on principles of denunciation, general and specific deterrence. It is important to say that general deterrence means that the sentence imposed should deter not simply the offender from reoffending, but also others in similar situations from engaging for whatever reasons in the same prohibited conduct.

[9] Here the court is dealing with an offence for having negligently performed a military duty imposed on the offender, which was to have failed to take proper precautions against unsafe discharge of his 9 mm pistol. It is a very serious offence but the court will impose what it considers to be the necessary minimum punishment in the circumstances.

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

a. The court considers as aggravating the objective seriousness of the offence. The offence you were charged with was laid in accordance with section 124 of the *National Defence Act*. This offence is punishable by dismissal with disgrace from Her Majesty's service or to less punishment.

b. Secondly the subjective seriousness of the offence and for the court, it covers four aspects:

i. The first aggravating factor from a subjective perspective is the context of the negligence. While cleaning your 9 mm pistol in your room in presence of some other soldiers, you negligently loaded it with live ammunition, aimed it improperly and shot at one of your colleague. Basically, while cleaning weapon in a room is not improper in a theatre of operation such as Afghanistan, you still must stand by the drill you have learned in order to ensure that you act in a safely manner while handling your weapon, which you clearly did not do. As a soldier, you know well how lethal is such a weapon. On the basic training course and at many other times in your career, you were told how you must handle weapons in a safe manner for you and others. You did not pay, for a moment, attention properly and as told, and it resulted in a serious incident.

ii. The second aggravating factor is the consequence of your negligence. One of your colleagues was injured by your action, and fortunately, it did not result in any permanent physical incapacity for him. Essentially, you hurt somebody because you were negligent and you could have hurt him more seriously or killed him.

iii. The third aggravating factor is the existence of a previous conviction for an offence of the same nature. Some three years before the commission of the offence brought before this court, you were found guilty of and offence laid pursuant to section 129 of the *National Defence Act* for having negligently handled in a safe manner a 9 mm pistol. Basically, you still demonstrate some inability to handle properly a 9 mm pistol despite a first conviction concerning this matter.

iv. Finally, the fourth aggravating factor is your rank and experience. As mentioned by your counsel, you went through three hard tours where you probably handle more than once a 9 mm pistol before being involved in this incident. At least, it was your second experience in Afghanistan in such a context and you should have learned from that experience. Your trade, as an infantryman, has exposed you to such thing more often than many other trades in the Canadian Forces and because of that, you are considered as being more than familiar with handling weapons. As a Master Corporal, you know that you must be an example to be followed by others, and you clearly failed to do so. Your lack of concern and recklessness you demonstrated while cleaning your weapon is difficult to reconcile with somebody having your rank and experience.

[11] There are also mitigating factors that I consider:

a. First, there is your guilty plea. Through the facts presented to this court, the court must consider your guilty plea as 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 it also discloses the fact that you are taking full responsibility for what you did. From the time the incident occurred to today, you clearly expressed your regret. It is clear for the court that if you could have done something different to avoid what happened, you would have done it without hesitation.

b. Your performance in your military service. Clearly, you deserve respect for what you did in your military career so far. You have always given what you had, no matter what are the task and the context, while facing the enemy or in your community, without expecting anything in return. Your records of service clearly reflect that and it is something that the court must consider.

c. The fact that you had to face this court martial. I'm sure it has had already some deterring effect on you but also on others.

d. The fact that your chain of command still has confidence in you despite what you did. Clearly, further to the incident, you kept the confidence of your superiors in the chain of command, and they still believe in you as a future leader in the Canadian Forces.

e. Your medical condition as it is of today. Despite the fact that your medical condition is not claimed as being the cause of what you did at the time of the incident, it is still relevant in the determination of the appropriate sentence that the court should consider.

[12] Concerning the fact that this court is to impose a sentence of incarceration to Master Corporal Elliott, it has been well established by the Supreme Court of Canada decision in *R.* v. *Gladue*[1] that incarceration should be used as a sanction of last resort. The Supreme Court of Canada specified that incarceration under the form of imprisonment is adequate only when any other sanction or combination of sanctions is not appropriate for the offence and the offender. This court is of the opinion that those principles are relevant in a military justice context, taking in account the main differences between the regimes for punishment imposed to a civilian tribunal seating in criminal matters and the one set up in the *National Defence Act* for a service tribunal.

[13] This approach was confirmed by the Court Martial Appeal court in *R.* v. *Baptista*[2], where it was said that incarceration should be imposed as a last resort.

[14] Here, in this case, considering the nature of the offence, the circumstances it was committed, the applicable sentencing principles including the general deterrence, the aggravating and the mitigating factors mentioned above, I conclude that there is no other sanction or combination of sanctions other than incarceration that would appear as the appropriate and the necessary minimum punishment in this case. On that issue, the court notes the agreement of both counsels.

[15] Now, what would be the appropriate type of incarceration in the circumstances of this case? As the criminal justice system in Canada has its own particularities, like the conditional sentence regime which is different of the probationary measures, but constitute nevertheless a punishment of incarceration with specific applications, allowing the offender to serve his sentence in the community in order to combine the objectives of punishing and correcting him at the same time, the military justice system does have, as a tool, the punishment of detention, which seeks 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 the Canadian Forces member from other members of society. Detention may have an important deterrent effect without stigmatizing a military convict to the same degree as military members sentenced to imprisonment, as it appears from the Notes added to articles 104.04 and 104.09 of the *QR&O*.

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[1] [1999] 1 S.C.R. 688, at paragraphs 38 and 40
[2] 2006 CMAC 1, at paragraphs 5 and 6

[16] Concerning the offender in this case, I consider that detention would be the most appropriate type of incarceration. The nature of the offence and the circumstances of this matter disclosed clearly that they called for some basic military principles and values to be re-instilled in Master Corporal Elliott, especially about responsibility in handling weapons. Additionally, it will serve as a general deterrence effect for those who would be tempted to take such approach as a proper conduct in the Canadian Forces.

[17] Concerning the length, the court considers that this situation would initially warrant detention for a period of 30 days. However, two main mitigating factors among others militate for reducing this period. First, Master Corporal Elliott has clearly expressed, since the incident occurred, that he regrets what happened. Second, he clearly kept the confidence of his chain of command despite what happened. Finally, such a period may jeopardize his chances of success in dealing properly with his current medical condition. Then, I conclude that 10 days of detention would be appropriate in the circumstances. It would meet the required sentencing principles and objectives, as well as maintaining discipline and confidence in the administration of military justice.

[18] I gave a long thought to the fact that a fine should be combined with the period of detention. The amount suggested appears very serious. I understand that counsel suggested a fine to this amount in order to reflect the general deterrence principle. Despite the fact that I found the amount suggested very high in the circumstances, I do believe that it reflects this sentencing principle and that it is not unreasonable in the circumstances of this case.

[19] Then, the court will accept the joint submission made by counsel to sentence you to detention for a period of 10 days and a fine in the amount of 5,000 dollars, considering that it is not contrary to the public interest and will not bring the administration of justice into disrepute.

[20] Master Corporal Elliott, please stand up. Therefore the court sentences you to detention for a period of 10 days and a fine in the amount of 5,000 dollars. The fine is to be paid in monthly instalments of 500 dollars each commencing on 1st September, 2010, and continuing for the following nine months.

[21] After the court provided to counsel an opportunity to comment, it considered whether it was desirable, in the interests of the safety of the offender, the victim or of any other person, to make an order prohibiting the offender from possessing any firearm. Despite that a firearm was involved in the commission of the offence, but that no violence was used, and considering the offender's behaviour for the last year and the counsel's comments about the necessity of such order, including the fact that he was

employed continuously without being restricted on such matter by his chain of command, it is the court decision that no such order is desirable.

Counsel:

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Counsel for Her Majesty The Queen
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Counsel for Master Corporal W.J. Elliott