Citation: *R. v. ex-Corporal D.D. Beek*, 2009 CM 3019

Docket: 200904

STANDING COURT MARTIAL
CANADA
ALBERTA
CFB EDMONTON

Date: 2 November 2009

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

HER MAJESTY THE QUEEN
v.
EX-CORPORAL D.D. BEEK
(Offender)

SENTENCE
(Rendered Orally)

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[1] Ex-Corporal Beek, having accepted and recorded a plea of guilty in respect of the six charges on the charge sheet, the court finds you now guilty of all these six charges.

[2] It is now my duty as the military judge who is presiding at this Standing Court Martial to determine 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 goes directly to the duty imposed to the court to impose a sentence commensurate with the gravity of the offences 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 sentence. They recommended that this court sentence you to imprisonment for a period of nine months. 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 it's 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 the Agreed Statement of Facts 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;
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> Secondly, the punishment of the offender;
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> 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 representation made by counsel and the documentation introduced.

[8] I must say that I agree with the prosecutor when he expressed the view that the protection of the public must be ensured by a sentence that would emphasize the 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 reasons, in the same prohibited conduct. It is important to say that some consideration must also be given to rehabilitation in this case.

[9] Here, the court is dealing with two offences of trafficking in cocaine, one offence of trafficking in methamphetamine, and three offences of trafficking in Ecstasy, which are considered as hard drugs because they have adverse effects on the mental and physical well-being of people using them. They are very serious offences. However, the court will impose what it considers to be the necessary minimum punishment in the circumstances.

[10] The Court Martial Appeal Court clearly stated, in the decision of *R. v. Dominie*, 2002 CMAC 8, at paragraph 5, that imprisonment may constitute the minimum necessary punishment for military members involved in the traffic of cocaine:

> Trafficking in crack cocaine on numerous occasions, even though it is non-commercial in nature, generally requires the imposition of actual imprisonment even for civilian offenders. In respect of military offenders, general deterrence requires that the military know that they will be imprisoned if they deal in crack cocaine on military bases. Suspended sentence simply is not available, except in the rare case of extremely mitigating circumstances.

[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 offences you were charged with relate in accordance with section 130 of the *National Defence Act* for trafficking contrary to subsection 5(1) of the *Controlled Drugs and Substances Act*. These types of offences are punishable by imprisonment for life or to less punishment

for substances included in Schedule I, which is the case for two charges on the charge sheet, and by imprisonment for a term not exceeding 10 years or to less punishment for substances included in Schedule III, which is the case for the four other charges.

The subjective seriousness of the offence. The Court Martial Appeal Court articulated the reasons why the involvement of drugs in a military environment must be treated as a very serious matter. In the decision of *MacEachern v. J.*, 4 CMAR 447, Judge Addy said:

> ... Because of the particularly important and perilous tasks which the military may at any time, on short notice, be called upon to perform and because of the team work required in carrying out those tasks, which frequently involve the employment of highly technical and potentially dangerous instruments and weapons, there can be no doubt that military authorities are fully justified in attaching very great importance to the total elimination of the presence of and the use of any drugs in all military establishments or formations and aboard all naval vessels or aircraft. Their concern in and interest in seeing that no member of the forces use or distributes drugs and in ultimately eliminating their use, may be more pressing than that of civilian authorities ...

The fact that the circumstances of the offences constitute multiple transactions within a short period of time by you of three different types of unauthorized drugs for a commercial purpose. Basically, you actively participated in the distribution of cocaine and Ecstasy to what appeared to you to be a civilian in the city of Edmonton. Despite the fact that you knew clearly the adverse mental and physical impact of these types of drugs on a person, you did not hesitate to provide a larger quantity of them during your transaction, knowing that it won't just affect this person, but others around him. Clearly, it is not the kind of behaviour that Canadian citizens are expecting from Canadian soldiers toward them.

[13] The court considers as mitigating:

Through the facts presented to this court, I also consider that your pleas of guilty an a genuine sign of remorse in that you are sincere in your pursuit of staying a valid asset to the Canadian community. The court does not want to jeopardize your chances of success because rehabilitation is always a key element when sentencing a person. Article 112.48(2)(a) of the Queen's Regulations and Orders impose to the court the duty to consider any indirect consequences of the sentence. The problems concerning your conduct in relation to drugs in the Canadian Forces were dealt with through administrative actions that finally resulted in releasing you from the Canadian Forces in April 2005. It put an end to a promising and stable career.

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

Your age and your career potential as a member of the Canadian society. Being 31 years old, you have many years ahead to contribute positively to the society in general.

The existence of a stable network made of a committed relationship with a woman, your daughter, your family, and your friends.

Also, you recovered well from a health issue and started to be a productive member of the society by finding and keeping a good job in 2008.

You were challenged by many people close to you in order to prove to them that you were again trustworthy, and you responded well to that challenge; and for that, I congratulate you and I hope you will keep on with this attitude.

The fact that all the transactions occurred off the base and five years ago. Delay is not really an issue in this trial, but at least it gave you time to demonstrate who you really are, and it helped the court to conclude that you succeeded in your effort to change over those years.

The fact that you had to face this court martial has 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] Considering the factors and circumstances of this case, the court believes that the joint submission is not unreasonable. In consequence, the court will accept the joint submission made by counsel to sentence you to the punishment of imprisonment for a period of nine months considering that it would not be contrary to the public interest and would not bring the administration of justice into disrepute.

[15] The prosecutor requested, in accordance with section 147.1 of the *National Defence Act*, that this court martial issue an order prohibiting the offender from possessing any firearm for an unspecified period of time. In order to consider if it is desirable to issue such order, the court must first decide if ex-Corporal Beek is convicted of an offence listed under that specific section. The relevant part of that section reads as follows:

147.1(1) Where a person is convicted by a court martial of an offence

...

(c) relating to the contravention of subsection 5(3) or (4), 6(3), or 7(2) of the Controlled Drugs and Substances Act

[16] Unfortunately, as I mentioned in my decision in *ex-Corporal Stevens*, subsection 147.1(1)(c) of the *National Defence Act* does refer to the punishment provisions for trafficking under section 5 of the *Controlled Drugs and Substances Act*, not the ones related to the commission of the offence of trafficking at subsection 5(1) or 5(2). It is the same situation for the French version. Obviously, there is an error in the drafting of this subsection. The reading of it produced an unintelligible result. According to this provision, as it reads, the court would have authority to issue a firearms prohibition order when the contravention of a punishment provision of the *Controlled Drugs and Substances Act* occurs which, in fact, does not constitute an offence for which a person may be convicted. However, the intention of the legislator is still clear, especially in the context of the existence of a very similar provision that can be found at subsection 109(1)(c) of the *Criminal Code*, which is written more appropriately. It is clear that Parliament intended in subsection 147(1)(c) of the *National Defence Act* to refer to the offence provision of trafficking and not to the punishment provision for that same offence.

[17] It is sufficient for the court to construe the references to subsection 4(3) or 4 as references to subsection 5(1) or (2) of the *Controlled Drugs and Substances Act* and 147.1(1)(c) of the *National Defence Act*, i.e., which would be identical to subsection 109(1)(c) of the *Criminal Code* dealing with the same very issue. Then, in short, the court concludes that the legislator's intent must be applied despite this mistake and that this provision must receive application.

[18] Having said that, considering the circumstances of the commission of the offences, the fact that in the course of these transactions the offender wasn't exposed or in possession of a weapon, the court considers that this is not in the interest of his safety and of any other person that such a prohibition order be issued.

[19] Ex-Corporal Beek, stand up, please. This court sentences you to imprisonment for a period of nine months. Please be seated. The sentence was passed at 1518 hours, on 2 November 2009.

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

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