Citation: *R.v. ex-Sergeant A.M. Finstad,* 2009 CM 3007

Docket: 2008-30

STANDING COURT MARTIAL
CANADA
SASKATCHEWAN
SASKATOON

Date: 11 May 2009

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

HER MAJESTY THE QUEEN
v.
EX-SERGEANT A.M. FINSTAD
(Offender)

SENTENCE
(Rendered orally)

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[1] Sergeant Finstad, having accepted and recorded a plea of guilty in respect of the second charge on the charge sheet, the Court finds you, now, guilty of that charge. The first and third charge, being withdrawn by the prosecutor, the Court has no other charge to consider for this court martial.

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

[3] As stated by a legal officer, Lieutenant-Colonel Jean Bruno Cloutier, in his thesis on the use of section 129 of the *National Defence Act* offences, the military justice system, and I quote, "... has for purpose to control and influence the behaviours and ensure maintenance of discipline with the ultimate objective to create favourable conditions for the success of the military mission."

[4] The military justice system 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. 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. 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).

[5] 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 a fine in the amount of $200. 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:

> " 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."

[6] 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.*

[7] 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 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, including the case law provided to the Court or quoted to the Court, and the documentation introduced.

[8] I must say that I agree with the prosecutor when he expressed that the protection of the public must be ensured by a sentence that would emphasize mainly general deterrence. It is important to say that general deterrence means that the sentence imposed should deter not simply the offender from reoffending, also others in similar situations from engaging, for whatever reasons, in the same prohibited conduct. It is

also important to say that some consideration must be given, in this case, to specific deterrence and rehabilitation.

[9] Here, the Court is dealing with an offence for applying for a Class B employment opportunity knowing that the nomination for it was not approved by the Commanding Officer. However, 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.

[11] The Court considers as aggravating:

> The objective seriousness of the offence. The offence you were charged with was laid in accordance with section 129 of the *National Defence Act*, for an act to the prejudice of good order and discipline. This offence is punishable by the dismissal with disgrace from Her Majesty's service or to less punishment.
>
> The fact that there was some sort of premeditation. You knew clearly, from the moment you initiated the process by submitting your name for a Class B terms of service to CFHSG authorities that you did not have the support of your chain of command for doing such thing. You totally ignored the rules and your superiors despite the fact that you were reminded of the applicable directive. You chose to proceed by your own rules, thinking others got it wrong.
>
> Because of your rank, position, trade, and experience, you should have known and acted better. Considering these factors, you should have demonstrated a better sense of loyalty, honesty, courage, and responsibility. It is certainly not the kind of behaviour the chain of command was expecting from you as a leader.

[12] 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 community. It discloses the fact that you're taking full responsibility for what you did.
>
> The fact that you did not have a conduct sheet or criminal record related to similar offences.
>
> Your psychological condition at the time of the commission of the offence and today. From the evidence introduced before this court, it is clear that personal problems you were going through might have clouded your judgement on some

issues. Without excusing what you did, it helps to understand why such behaviour might have occurred.

Your age and your career potential as a member of Canadian society. Being 37-years old, you still have many years ahead to contribute positively to the society in general.

The fact that it is an isolated incident and that no such similar conduct occurred before or after the commission of the offence. The reality is that your conduct did not impact on the operation of your unit or other people.

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.

The delay to deal with this matter. The court does not want to blame anybody in this case, but the closest the disciplinary matter is dealt with, more relevant and efficient is the punishment on the morale and the cohesion of the unit members, especially when somebody disclosed a problem for respecting the chain of command, as you did. On the other hand, you had to wait to a point that this court martial became, indirectly, a reason for the CF for waiting to calculate disability payments you are entitled to. It might have been concluded earlier if the court martial would have taken place sooner. What is the most surprising for the Court is the number of times it took for the chain of command to get the military justice system process right, despite the existence of legal officers and the usual availability of legal advice. On the other side, it took more than a year after charges were laid for Sergeant Finstad to get, finally, legal assistance for the disciplinary matter she was involved in. Things should have been handled better, and no one seems to have really cared about it. Then, delay must be a factor to consider.

[13] In consequence, the Court will accept the joint submission made by counsel to sentence you to a fine to the amount of $200, considering that it's not contrary to the public interest and would not bring the administration of justice into disrepute.

[14] Sergeant Finstad, please stand up. Therefore, the Court sentences you to a fine in the amount of $200. Please be seated.

[15] The proceedings of this Standing Court Martial in respect of Sergeant Finstad are terminated.

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

COUNSEL:

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