

Citation : *R. v. Corporal A.E. Liwyj*, 2009 CM 3009

Docket: 200922

**STANDING COURT MARTIAL
CANADA
MANITOBA
CANADIAN FORCES BASE SHILO**

Date : 4 June 2009

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

HER MAJESTY THE QUEEN

v.

**CORPORAL A.E. LIWYJ
(Offender)**

**SENTENCE
(Rendered Orally)**

INTRODUCTION

[1] The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency, and morale of the military. The Supreme Court of Canada has recognized that breaches of military discipline must be dealt with speedily, and frequently punished more severely, than would be the case of a civilian engaged in a similar conduct. However, the punishment imposed by any tribunal, military or civil, should constitute the minimum necessary intervention that is adequate in the particular circumstances. The primary interest of a court martial is still the maintenance or restoration of discipline, which has been described as a willing and prompt obedience to lawful orders.

[2] In determining sentence, the court has considered the circumstances surrounding the commission of the offences, as revealed by the evidence heard during the trial, and the applicable principles of sentencing, 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*. The court also considered the representations made by counsel including the case law provided to the court and the documentation introduced.

[3] Corporal Liwyj was found guilty of three charges under the *National Defence Act*. The charges relate to an offence punishable under section 83 of the *National Defence Act* for disobeying an order given by a superior officer.

[4] Here, in this case, the prosecutor suggested that the court impose on the offender a severe reprimand and a fine in the amount of \$1500. On the other hand, the offender's defence counsel recommended to the court to impose a fine in the amount of \$200.

[5] When a court must sentence an offender for offences that he has committed, certain objectives must be pursued in light of the applicable sentencing principles. It is recognized that these principles and objectives will slightly vary from case to case, but they must always be adapted to the circumstances and to the offender in order to contribute to one of the essential objectives of military discipline; that is, the maintenance of a professional and disciplined armed force that is operational, effective and efficient. The sentencing principles and objectives could be listed as:

- a. Firstly, the protection of the public, and this, of course, includes the Canadian Forces;
- b. Secondly, the punishment and the denunciation of the unlawful conduct;
- c. Thirdly, the deterrence of the offender and any other persons from committing similar offences;
- d. Fourthly, the rehabilitation of offenders;
- e. Fifthly, the proportionality to the gravity of the offence and the degree of responsibility of the offender;
- f. Sixthly, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; and
- g. Finally, the court shall consider any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[6] In this case, the protection of the public must be achieved by a sentence that will emphasize the principal of general deterrence, and at a lower degree, the denunciation of Corporal Liwyj's conduct. 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.

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

[8] The court considers as aggravating:

- a. The objective seriousness of the offence. The offences you were charged with were laid in accordance with section 83 of the *National Defence Act* for disobeying a lawful command of a superior officer. This type of offence is punishable by imprisonment for life or to less punishment.
- b. The subjective seriousness of the offence. The high degree of responsibility and confidence that you owe as a vehicle technician at the rank of corporal. You are a very skilled and knowledgeable person repairing essential equipment to provide goods, ammunition and movements to troops on the ground. Your work is essential to the success of any mission performed by your unit, and you should have given better consideration to that.
- c. The repetition of the offence. Despite that you were given the same order at three different times by two different superiors, you demonstrated a total lack of respect toward your superiors and to one of the most important ethic principle for a soldier, which is to obey and support lawful authority.
- d. The fact that your decision to disobey the orders given to you had a clear impact on the operations of the unit and placed an additional burden on your fellow soldiers. A trailer was not available for unloading ammunition during an exercise, and your task had to be performed later by two other vehicle technicians.

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

- a. The fact that you did not have a conduct sheet or criminal record related to similar offences.
- b. Your record of service in the Canadian Forces. It is clear from the testimonies of various witnesses heard in this trial that you are a very competent and knowledgeable vehicle technician.
- c. The absence of any impact on discipline within the 1 RCHA Maintenance Platoon or any other 1 RCHA unit organization.

- d. The recorded warning given to you in relation to this 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.
- e. The court also considers that the fact that you had to face this court martial has already had some deterrent effect on you, but also on others.
- f. 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 an attitude problem, as you did. This case that was brought in the turmoil of some important legal debate about the military justice system because of different and inherent circumstances. It is unfortunate that such thing happened, but I consider the delay to be of little impact in these particular circumstances.

[10] Corporal Liwyj, nothing prevents you to express your views to your superiors when you are dealing with mechanics' issues. In fact, your chain of command expects you to provide your comments on ways to solve problems and repair things, especially when there is a safety issue. However, you must learn to be confident in your superiors and in your chain of command. At some point your superiors are making decisions, and I can assure you that they will be accountable for them. Morale and cohesion among members of a unit, whatever is the rank, rely mainly in trust they have toward each other. Their life may depend on it. You should learn to be more open-minded on some issues and trust those who are part of your team, including your superiors. You may question orders and bring your concerns to your superiors when appropriate, but also you shall obey orders at any time, unless they are manifestly unlawful. Part of your job is to identify mechanical problems on Canadian Forces equipment and I am sure you're doing it well, but you must also learn that when it belongs to other people to decide how to deal with those problems, you shall let them decide, despite the fact that you disagree.

[11] The appropriate range for an offence of this nature is from a severe reprimand, or reprimand and a fine, down to a fine. The court reiterates that a reprimand must be seen as a serious punishment in the military context. It is higher on the scale of punishment than a fine, whatever the amount of the fine. It reflects that there is some reason to have doubts about somebody's commitment at the time of the offence, and it reflects consideration given to the seriousness of the offence committed, but it also means that there is good hope for rehabilitation.

[12] A fair and just punishment should recognize the gravity of the offence and the responsibility of the offender in the context of this particular case.

[13] Corporal Liwyj, stand up, please. This court sentences you to a reprimand and a fine of \$750. The fine is to be paid in monthly instalments of \$125 each commencing on 1 July 2009 and continuing for the following five months. In the event you are released from the Canadian Forces for any reason before the fine is paid in full, the then outstanding unpaid amount is due and payable the day prior to your release.

[14] The proceedings of this court martial in respect of Corporal Liwyj are terminated.

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

COUNSEL:

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Counsel for Her Majesty The Queen

Lieutenant-Commander P. Lévesque, Directorate of Defence Counsel Services
Counsel for Corporal A.E. Liwyj