Citation: *R. v. Corporal K.R. McGinnis-Armstrong,* 2009 CM 3011

Docket: 200880

STANDING COURT MARTIAL
CANADA
NOVA SCOTIA
CAMP ALDERSHOT

Date: 23 June 2009

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

HER MAJESTY THE QUEEN
v.
CORPORAL K.R. MCGINNIS-ARMSTRONG
(Accused)

SENTENCE
(Rendered orally)

---

[1] Corporal McGinnis-Armstrong, having accepted and recorded a plea of guilty in respect of the first and second charge on the charge sheet, the court finds you, now, guilty of these charges. Consequently, the court directs that the proceedings be stayed on the third charge. Charges 4 to 10 being withdrawn by the prosecutor, the court has no other charge to consider for this court martial.

[2] It is now my duty, as the military judge who is presiding at this Standing Court Martial, to determine the 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. 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 as the same way as any other person living in Canada.

[3] 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, and I quote, "Impose a sentence commensurate with the gravity of the offences and the previous character of the offender," as stated at QR&O 112.48(2)(b).

[4] Here, in this case, the prosecutor suggested that this court sentences you to detention for a period of 30 days. On the other hand, your defence counsel suggested that this court sentences you to detention for a period of seven days, and that this court suspends the carrying into effect of that punishment.

[5] The court has considered those suggestions in light of the relevant facts set out in the statement of circumstances and the admissions, and their significance, and I've also considered them 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; secondly, the punishment and denunciation of the unlawful conduct; 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 and the documentation introduced.

[6] On 20 April 2007, just four days after you arrived at BFC Wainwright in the province of Alberta, you learned through a phone conversation with your girlfriend that she considered that it would be appropriate if both of you started to date other persons. Basically, she told you that she was not interested anymore in the relationship she had with you for the last three years. Being far from your own place, where she was, you felt lonely and powerless, considering the situation. It is at that time that you made the conscious and deliberate decision that, in order to take your emotional pain away, you wouldn't have any limit to the quantity of alcohol that you would drink that night, a thing you clearly did.

[7] However, due to the consumption of alcohol that made you highly intoxicated, that decision resulted in an extreme disorderly and disrespectful behaviour. There was no limit to the disruption and damage you could cause to others. Not satisfied with the damages caused to some cars, you decided that those who would be in your way to stop you won't succeed, no matter what is their status and authority. It is that state of mind that brought you in a ground fight with a military police member who legitimately tried to stop you. When he wanted to arrest you, you struggled, and did not hesitate to kick him many times in order to get away from him.

[8] I must say, that considering the nature and the circumstances of the offences for which you pleaded guilty, I consider that the protection of the public must be achieved by a sentence that would emphasize mainly 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. Also, consideration must be given by this court to rehabilitation.

[9] Here, the court is dealing with one offence punishable under section 97 of the *National Defence Act* for drunkenness, and with one offence punishable under section 130 of the *National Defence Act* for assaulting a peace officer, contrary to section 270 of the *Criminal Code.* These are very serious offences; 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 considers as aggravating:

> The objective seriousness of the offences. The first offence you were charged with was laid in accordance with section 97 of the *National Defence Act* for drunkenness. In the circumstances, this offence is punishable by detention for a maximum of 90 days, or to less punishment. The second offence you were charged with was a *Criminal Code* offence that was laid in accordance with section 130 of the *National Defence Act* for assaulting a peace officer, contrary to section 270 of the *Criminal Code.* This offence is punishable by a term not exceeding five years of imprisonment or to less punishment;
>
> The subjective seriousness of the offences. As you stated in your own testimony to the court, it is on your own will that you decided to get drunk that night. There was no special occasion to celebrate or nobody influenced your decision to do so. You decided that it will be that way;
>
> A marked military police vehicle, with a military police member fully equipped, wearing a red beret, should have indicated to you that the party was over.
>
> However, to the contrary, you demonstrated a total lack of respect toward those who have the responsibility to apply the law and provide security to our community. You did not hesitate to kick a peace officer performing his duty in order to get away from him, and it is further to the threat to use the Taser that you finally calmed down for a moment;
>
> You were belligerent and aggressive towards authority, which constitutes a serious concern in the circumstances of this case. You should have known better that a soldier's ethic principle, such as obey and support lawful authority, would have passed before yourself and your own hurt feelings;

The offence for which you pleaded guilty was committed outside, but also on a defence establishment. As you express it in your testimony, it was a shame for you, your peers, your unit, and also for the Canadian Forces;

Because of your actions, the military police member who arrested you was slightly injured and off duty for a couple of days. However, without clear medical evidence, it is difficult for this court to assess to what extent the injury caused during the altercation with you contributed to the health discomfort Master Corporal Mullins is going through.

[11] 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 very clear genuine sign of remorse, and that you are very sincere in your pursuit of staying a valid asset to the Canadian Forces and the Canadian community. It disclosed the fact that you're taking full responsibility for what you did. Moreover, you reiterate here, during your testimony in court, your sincere remorse for what happened during that incident, which confirmed to the court that you sincerely regret, from the beginning, the conduct you had at that time;

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

The fact that you recognized, right away after the incident, that your conduct was inappropriate. You fully cooperated with the police investigators. Also, in light of your conduct, you agreed, right after the events, to reimburse those who were victims of your excess of emotions. Despite the fact that you just did it, the court notes mainly that you proceeded with the restitution when requested;

The fact that you decided, on your own, to prevent any other potential incident by actively consulting an addictions counsellor. Despite the fact that you decided to do so in relation to arrest on a recent incident and not to the one which is the object of this trial, the court considers that you clearly have sincerely initiated a rehabilitation process in order to avoid, forever, any similar conduct in relation to your consumption of alcohol. I encourage you to continue to do so and I hope that it will help you to understand what is going on with you and to behave in a more appropriate manner;

Your record of service in the Canadian Forces. It appears, from the evidence produced before this court martial, that you are a good soldier, have good skills, and that you are dedicated and trusted by your chain of command to the extent that your unit sent you on your leadership course, despite what you did;

> The fact that your conduct did not impact substantially on the operation of your unit you were part of in Wainwright at the time of the incident;
>
> Your age and your career potential as a member of the Canadian Forces. Being 22 years old, you have many years ahead to contribute positively to the Canadian Forces and the society in general;
>
> The fact that you had to face this court martial. It has, already, some deterrent effect on you, and also on others;
>
> 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, the more relevant and efficient is the punishment on the morale and the cohesion of the unit members, especially when somebody disclosed a serious attitude problem, as you did.

[12] Concerning the fact for this court to impose a sentence of incarceration to Corporal McGinnis-Armstrong, it has been well established by the Supreme Court of Canada decision in *R. v. Gladue,* [1999] 1 S.C.R. 688, at paragraph 38 and 40, 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 into account the main differences between the regimes for punishment imposed to a civilian tribunal sitting 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*, 2006 C.M.A.C. 1, at paragraphs 5 and 6, where it was said that incarceration should be imposed as a last resort.

[14] Here, in this case, considering the nature of the offences, and especially the assault on a peace officer performing his duty, the circumstances they were committed, the applicable sentencing principles, including sentences imposed on similar offenders for similar offences committed in similar circumstances by military and civilian tribunals, 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 counsel.

[15] When military police members that are specifically invested of powers as arresting, without warrant, any person who is subject to the Code of Service Discipline are exercising their legal authority, it is the minimum, at least, that they can do it with the

necessary respect and protection required by such situations; otherwise, it would jeopardize their authority to carry out the Code of Service Discipline, and at the same time the success of the Canadian Forces' mission.

[16] 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 from the probationary measures, but constitutes, nevertheless, a punishment of incarceration with specific applications allowing the offender to serve his sentence in the community in order to combine the objective 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 reinstalling 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 members 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&Os.

[17] Concerning the offender in this case, I consider that detention would be the most appropriate type of incarceration. The nature of the offences and the circumstances of this matter disclose, clearly, that they call for some basic military principles and values to be reinstalled in Corporal McGinnis-Armstrong, especially about respecting legal authorities such as peace officers. 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.

[18] Concerning the length, the court considers that this situation would initially warrant a period of 21 days of detention; however, two main mitigating factors, among others, mitigate for reducing this period. First, Corporal McGinnis-Armstrong has clearly expressed, since the incident occurred, that he regrets what happened, and he has mainly behaved accordingly, by his own words and acts, for the last two years. The court would not want to jeopardize his chances of success by imposing a long period of detention that would preclude him from continuing his effort to rehabilitate himself, and it is always a key element when sentencing a person.

[19] Second, despite the seriousness of the offences and the principle that charges be dealt with in an expeditious and speedy manner for having an efficient military justice system, as recognized by the Supreme Court of Canada in *R. v. Genéréux*, [1992] 1 S.C.R. 259 at page 293, and as expressed at section 162 of the *National Defence Act*, it took eight months for the unit to lay charges after the completion of the investigation report, and an additional nine months for the chain of command to refer the matter to the Director of Military Prosecutions in order to see the case disposed of by a court martial. If the chain of command considered those charges as serious and important, this is not the kind of message that this court received through the manner it decided to deal with. The

end result is that the chain of command made the offender wait for 17 months, when it would have been something close, from three to five months. The court considers that there is a full year for which the offender had to wait without any explanation. It is unacceptable in such situation where the case was not long to investigate and not complex to deal with.

[20] Considering the conduct of the offender since the incident, and his sincere regret and efforts to rehabilitate himself, and the time to deal with this matter, mainly in reason of the unexplained behaviour of the chain of command, the court came to the conclusion that detention reduced to a period of seven days would be sufficient 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. It would also constitute an appropriate remedial measure of relief in the circumstances.

[21] I would say, in addition, that the evidence before me does not provide the court with compelling reasons that will allow it to suspend such period of detention. The court's conclusion is that the evidence before this court does not disclose any exceptional circumstances that would justify this court to suspend the sentence of detention. To the contrary, the court's conclusion is that a suspension of the detention would not serve the sentencing principles of denunciation and general deterrence in the circumstances of this case.

[22] Corporal McGinnis-Armstrong, please stand up. Therefore, this court sentences you to detention for a period of seven days. After the court provided to counsel an opportunity to comment, it considered whether it was desirable, in the interest of the safety of the offender, the victim, or of any other person, to make an order prohibiting the offender from possessing any firearm. Considering that no firearm was involved in the commission of the offence, and that no violence other than the one implicitly included in the commission of the offence of assault was used, and considering the offender's behaviour for the last two years, and the counsel's comments, it is the court's decision that no such order is desirable. Also, in the absence of an application by the prosecution to make an order for the provision of samples for DNA analysis, in accordance with 196.14(3) of the *National Defence Act*, for a secondary designated offence, the court does not have to consider making such an order. Please be seated.

[23] The sentence was passed at 2:28 p.m. on 23 June 2009.

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

COUNSEL:

Major P. Rawal, Regional Military Prosecutions Atlantic
Counsel for Her Majesty the Queen

Major A. Litowski, Directorate of Defence Counsel Services
Counsel for Corporal K.R. McGinnis-Armstrong