



COURT MARTIAL

Citation: *R v McKinnell*, 2012 CM 1002

Date: 20120312

Docket: 201109

Standing Court Martial

Canadian Forces Base Wainwright
Denwood, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Ex-Private McKinnell D., Offender

Before: Colonel M. Dutil, C.M.J.

REASONS FOR SENTENCE

(Orally)

[1] Ex-Private McKinnell was charged for having committed 12 offences. He admitted his guilt to the following three offences: firstly, one count of conduct to the prejudice of good order and discipline under s. 129 of the *National Defence Act* for use of cannabis (marihuana) contrary to article 20.04 of the Queen's Regulations and Orders for the Canadian Forces; secondly, one count of trafficking in a substance included in Schedule II, to wit cannabis (marihuana) punishable under s. 130 of the *National Defence Act* contrary to subsection 5(1) of the *Controlled Drugs and Substances Act*; and thirdly, one count of pointing a firearm punishable under s. 130 of the *National Defence Act* contrary to subsection 87(1) of the *Criminal Code*. The prosecution did not call evidence for the remaining charges and the court found ex-Private McKinnell not guilty of these charges accordingly.

[2] It is now incumbent upon me to determine what shall be an appropriate, fair and just sentence. Counsel for the prosecution and defence have made a joint submission on sentence. They recommend that ex-Private McKinnell be sentenced to imprisonment

for a period of 60 days. As the offender was already on probation and the subject of weapons prohibition order imposed by the Provincial Court of Alberta for an offence under s. 267(a) of the *Criminal Code*, the prosecution asks the court to issue a similar order pursuant to s. 147.1 of the *National Defence Act* that would extend the period of prohibition to life with regard to the possession of any of the items for which the offender was previously the subject of a prohibition for a period of 10 years. Although the court is not bound by this joint submission, it is generally accepted that a joint submission ought to be rejected only if it is contrary to the public interest and the sentence would bring the administration of justice into disrepute.

[3] In the context of sentencing an offender under the Code of Service Discipline, a court martial should guide itself with the appropriate sentencing purposes, principles and objectives, including those enunciated in ss. 718.1 and 718.2 of the *Criminal Code*. In addition, when a person is convicted of trafficking in a drug, s. 10 of the *Controlled Drugs and Substances Act* must also be considered by the sentencing judge.

[4] The fundamental purpose of sentencing at court martial is to contribute to the respect of the law and the maintenance of military discipline by imposing punishments that meet one or more of the following objectives: the protection of the public and it includes the interest of the Canadian Forces; the denunciation of the unlawful conduct; the deterrent effect of the punishment, not only on the offender but also upon others who might be tempted to commit such offences; and, the reformation and rehabilitation of the offender. The sentence must also take into consideration the following principles. The sentence must be commensurate with the gravity of the offence, the previous character of the offender and his/her degree of responsibility; the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. A court must also respect the principle that an offender should not be deprived of liberty if less restrictive punishments may be appropriate in the circumstances. In other words, punishments in the form of incarceration should be used as a last resort. Finally, the sentence will be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. However, the court must act with restraint in determining sentence in imposing such punishment or punishments that should be the minimum necessary intervention to maintain discipline.

[5] The facts surrounding the commission of the offences reveal that ex-Private McKinnell was a member of the Regular Force posted to the Land Force Western Area Training Centre (LFWA TC), at Canadian Forces Base (CFB) Wainwright, Alberta. He had enrolled as an infantryman in late August 2008 and completed the Basic Military Occupation course at the end of November 2008. Ex-Private McKinnell was released from the Canadian Forces on 16 May 2010 under the release item 2(a) for reasons directly related to the charges before this court and the conviction entered in the Provincial Court of Alberta for another offence involving a weapon committed in 2009 and for which he was sentenced in January 2010.

[6] Ex-Private McKinnell was aware at the time of the offence that he was not permitted to use any drug unless its use was authorized pursuant to the terms of article 20.04 of the Queen's Regulations and Orders.

[7] In early April 2010 and as a result of information obtained regarding another member of the Canadian Forces, the Canadian Forces National Investigation Service (CFNIS) engaged in an investigation on drug activities at CFB Wainwright. As a result of that investigation and having obtained the appropriate search warrant, the investigators seized ex-Private McKinnell's media recording devices in his room in Building 626. Several video recordings were found on the equipment that was seized from ex-Private McKinnell's bed space. The video recordings depicted various Canadian Forces members engaged in a variety of activities, including drug activities, in and around the area of CFB Wainwright. Ex-Private McKinnell's voice could be heard in many of the videos because he was often the person operating the equipment. However, ex-Private McKinnell appeared on a number of these videos engaged in the use, possession and trafficking of controlled substances, most notably cannabis (marihuana).

[8] On a video recorded on 22 November 2009 ex-Private McKinnell is seen sitting in a truck at CFB Wainwright with another member of the Canadian Forces. Ex-Private McKinnell is shown smoking a pipe of cannabis (marihuana) and inhaling from the pipe, saying he is going to add some more "green."

[9] Another video recorded on 30 November 2009 reveals ex-Private McKinnell sitting on a chair in a barrack room at CFB Wainwright, in his CADPAT uniform, with a magazine on his lap. A ziplock bag of marihuana is resting on the magazine. Ex-Private McKinnell is shown rolling a cigarette of marihuana on the magazine. He says, "You know me, private McKinnell... I'm just rolling a joint here. I'm still in my fucking uniform, well the majority of it. No boots." The camera then pans down to his bare feet.

[10] A third video recorded on 16 December 2009 shows ex-Private McKinnell in CADPAT uniform sitting in a vehicle at CFB Wainwright with another member of the Canadian Forces. The other person is wearing the Distinctive Environmental Uniform, known as DEUs. Ex-Private McKinnell holds up a bag of marihuana. He then places a small amount of marihuana in a pipe, lights the pipe and smokes the marihuana.

[11] In a fourth video recorded on 1 March 2010, Ex-Private McKinnell is seen sitting in a car with other members of the Canadian Forces. He has a ziplock bag of marihuana. He takes a portion of the marihuana and places it on the top of a takeout food box. He is then seen rolling a cigarette of marihuana. The vehicle is stopped in a field in the area of CFB Wainwright. All the occupants are seen to exit the vehicle. Ex-Private McKinnell lights the cigarette, takes two or three drags of it and hands it to another member of the Canadian Forces who also takes two or three drags of it before re-

turning it to ex-Private McKinnell. The cigarette of marihuana weighed no more than 0.3 grams.

[12] Finally, a last video recorded on 2 March 2010 shows Ex-Private McKinnell holding a firearm, a Canadian Forces C7 service rifle, in a barrack room at CFB Wainwright. Ex-Private Humphrey is shown lying on his stomach on the floor with his hands resting on the back of his head. On a signal from the video camera operator, Ex-Private McKinnell faces the camera and says, "OK, so ah... I got a weapons ban, 10 years." He then pulls back on the cocking handle of the C7 Rifle and lets go of it. The cocking handle moves forwards to its locked position, thus showing the presence of a bolt. Ex-Private McKinnell says, "fuck that." He then hits the forward assist, points the C7 Rifle at ex-Private Humphrey's head, and pulls the trigger. A click is heard when the trigger is pulled. The click is the sear striking the firing pin. Ex-Private McKinnell then closes the ejection port cover takes a step in the direction of the camera and looking at it says, "totally against the law." A magazine is not inserted in the C7 rifle at that time.

[13] During the sentencing hearing, relevant evidence was filed before the court, including ex-Private McKinnell's testimony. Other than the fact of being released in May 2010, almost two years before this trial, the court was informed of significant events that provide elements to assist the court in determining sentence. The court retains the following facts. On 28 January 2009, Ex-Private McKinnell's first phase of infantry training (DP1) was ceased due to an ankle injury. On 2 February 2009, he requested his voluntary release from the Canadian Forces, which is less than six months after his enrolment. From March to August 2009, he suffered from various ailments and attended the Medical Clinic approximately ten times. As a result, he was either declared « unfit for duty » or « light duty only » for most of that period. On 15 April 2009, ex-Private McKinnell withdrew his request for release and asked a Voluntary Occupational Reassignment (VOR) to crewman in the armoured corps. On 17 September 2009, his VOR application with favourable recommendation was sent to Ottawa. In early October 2009, unaware that his VOR had been approved, he re-applied for voluntary release.

[14] On 5 November 2009, he was admitted at the Centennial Centre for Health and Brain injury, as he suffered from depression and suicidal thoughts. During his stay at the Centre, he went to psycho-educational groups and received some counselling. He was released from that Centre on 13 November 2009 and prescribed some anti-depressant medication.

[15] On 23 November 2009, he was involved in the pellet gun incident that resulted in his conviction before the Provincial Court of Alberta on 21 January 2010 for an offence under s. 267(a) of the *Criminal Code* i.e. assault with a weapon. He was sentenced to imprisonment for a period of 30 days and placed on probation for twelve months. In addition, the court issued an order subjecting ex-Private McKinnell, a first offender

at the time, to a lifetime prohibition in relation to prohibited firearms, restricted firearms, prohibited weapons, prohibited devices and prohibited ammunition, and to a 10-year prohibition with respect to other firearms, restricted weapons, cross-bows, ammunition, and explosive substances. A DNA order was also issued by the court.

[16] On 4 December 2009, he met with the Base Addiction Counsellor and was evaluated in relation to his drug abuse and mental health issues. He was rated as high probability of substance abuse disorder and treatment options were discussed. It was agreed that Ex-Private McKinnell would engage in community self support base group and that he would discuss residential treatments with his parents over Christmas. On 9 December 2009, Ex-Private McKinnell was counselled again as he was depressed because the court date before the Provincial Court of Alberta was set for 17 December.

[17] On 20 January 2010, NDHQ Ottawa directed Ex-Private McKinnell's unit to have him evaluated for possible drug dependency. A month after, he was served with a Notice of Intent to release under item 2(a) for which he did not object. Ex-Private McKinnell's commanding officer sent his recommendation for release to Ottawa the next day. The following day ex-Private McKinnell, still suffering from depression, was seen at the mental health services. An appointment with a doctor would be made for reassessment.

[18] On 4 March 2010, ex-Private McKinnell was referred by his commanding officer for medical assessment on « possible drug dependency ». On 8 March 2010, having been medically assessed, he was assigned the following medical employment limitations: unfit any weapon; unfit to drive DND vehicles; unable to supervise personnel; unable to work in hazardous environment; and unable to be placed in a position of responsibility. On 11 March 2010, ex-Private McKinnell signed the « Admin review Disclosure Waiver ». On 9 April 2010, a message from NDHQ Ottawa confirmed the approval a 2(a) release as the approving authority had determined that ex-Private McKinnell had violated the CF drug policy. On 13 April 2010, a report from medical personnel indicated that ex-Private McKinnell was still awaiting release and that his drug use had worsened. On 19 April 2010, the Base Addiction Counsellor reported that "although residential treatment for ex-Private McKinnell would be in his best interest, his chain of command is not in compliance." On 29 April 2010, ex-Private McKinnell was posted to 17 Wing, Winnipeg where he stayed until his release on 16 May 2010.

[19] Investigators arrested ex-Private McKinnell on 24 April 2010 and he was released 4 days later. On 25 April 2010 ex-Private McKinnell voluntarily participated in a chartered and cautioned interview with investigators. He provided a candid description of the drug activities that occurred in Building 626 and readily confessed to his own involvement in these activities. He was visibly upset during portions of the interview. Ex-Private McKinnell told investigators that he started smoking marihuana in April 2009 on and around CFB Wainwright. His marihuana use escalated to the use of

various other illicit drugs as well as abuse of prescription drugs. Ex-Private McKinnell expressed a desire to get treatment for his addictions. During the interview, the investigator observed that ex-Private McKinnell had been barely able to walk at the time of his arrest and further discussed the negative physical effects ex-Private McKinnell was suffering due to his drug use. Among other issues, Ex-Private McKinnell had been fitted with a catheter to solve his urinary problems the day before his arrest.

[20] Ex-Private McKinnell testified that since his detention in April 2010, he has been totally free of drugs. He added that he does not enjoy drinking alcohol. According to him, his demons are totally under control. During his testimony, he made it clear that he is remorseful for his misconduct and the turmoil he has caused to others, including his previous supervisors. He does not have permanent employment as of yet, but he believes that he should be able to secure one after serving his punishment.

[21] The Court Martial Appeal Court and numerous courts martial have constantly held that the use and the trafficking of drugs is more serious in the military community because of the very nature of the duties and responsibilities of every CF member in ensuring the safety and the defence of our country and of our fellow Canadian citizen. The military community cannot tolerate breaches to its strict and well-known policy prohibiting the use of illicit drugs. In *Lee v The Queen*, 2010 CMAC 5, 22 April 2010, O'Reilly J.A., for the court, reiterated the applicable principles of sentencing in a military context for offences of drug trafficking at para. 26-27:

[26] It is clear that trafficking in drugs within the military is a serious offence and that convictions usually result in carceral sentences. The main concern in determining the appropriate sentence is to deter others. As the Court stated in *Dominie v. The Queen*, 2002 CMAC 8, "general deterrence requires that the military know that they will be imprisoned if they deal in crack cocaine on military bases" (para. 5).

[27] The same concern was expressed in a case where the accused was charged with a single offence of trafficking in a small amount of cocaine (*Taylor v. The Queen*, 2008 CMAC 1). The Court upheld the Military Judge's sentence of 40 days' imprisonment. The Military Judge justified the sentence by stating that the "use of drugs and the trafficking of drugs are a direct threat to the operational efficiency of our forces and a threat to the security of our personnel and equipment".

[22] There should be no issue that the sentence of an offender for trafficking in drugs must emphasize the principles of denunciation of the conduct and the punishment of the offender as well as general and individual deterrence. The fact that a military offender has been administratively released from the Canadian Forces prior to his court martial for drug trafficking does not diminish the importance to protect the public at large in the maintenance of a just, peaceful, and safe society. The same can be said for weapons offences.

[23] The aggravating factors in this case can be summarized as follows:

- a. The fact that you are a recidivist for improper use of a weapon and that you were on probation and the subject of a weapons prohibition order at the time of the offence of pointing a firearm; that is your C7 Rifle. As revealed by the circumstances provided to the court, you pointed a firearm at Private Humphrey in a gesture of provocation and blatant disregard to the rule of law and of our justice system. Not only, is it a serious offence in itself, your blameworthiness reached the highest level possible because it was a sad demonstration of total disrespect in our democratic institutions and the clear indication that you did not take your previous conviction seriously.
- b. The objective seriousness of the offences for which you have entered a plea of guilty. A person found guilty of an offence under s. 129 of the *National Defence Act* is liable to dismissal with disgrace from Her Majesty's service. A person found guilty of trafficking in cannabis (marijuana) contrary to s. 5(1) of the *Controlled Drugs and Substances Act* is liable to imprisonment for life, however it is reduced to five years less a day if the quantity involved does not exceed three kilograms as it is the case here. Finally, a person found guilty of pointing a firearm under s. 87(1) of the *Criminal Code* is liable to imprisonment for 5 years. These offences are all serious.
- c. The circumstances surrounding the commission of the offences related to the use and traffic of illicit substances. Your drug use occurred on numerous occasions and involved the presence of other soldiers at or near a defence establishment. In the case of the traffic of cannabis marijuana, the social trafficking took place in the area of CFB Wainwright and it involved also another soldier.

There is however significant mitigating factors in this case:

- a. You have pleaded guilty to the third, the sixth and the eighth charge at the earliest opportunity. The court considers this complete admission of guilt as a sincere expression of remorse and the full acceptance of responsibility for your misconduct especially in light of your testimony where you have also offered apologies to those that you felt were aggrieved by your misconduct. I must say that without your testimony the court is not convinced that the plea of guilty would have had such significant weight in the circumstances.
- b. The passage of time. The original charges were laid more than two years ago and preferred last in February 2011. This matter should have been brought to trial more speedily. However, you testified that you had hoped that these charges would disappear on their own.

- c. You are still a very young person, a young adult. Rehabilitation seems well engaged and I must add that you should realize that your record does not require any new entry, and when I mean record I mean criminal record, that your record does not require any new entry in the future unless you want the justice system to lose faith in your potential for rehabilitation. I hope and I am sure that your counsel had a long discussion with you to that effect that it is your last chance. I hope that you understand that clemency may have a rendezvous with you if you have other altercations or incidents with the justice system.
- d. And finally the fact that, of course, you were released from the Canadian Forces in May 2010 largely for the events that led to the charges before the court.

[24] The court agrees with counsel that this case fits within the range of sentences imposed in similar matters. The proposed punishment of imprisonment for a period of 60 days is not so off the mark that its adoption by this court martial would be contrary to the public interest or bring the administration of justice into disrepute. Of course, all the caselaw that were provided to the court by the prosecution were relevant and I understand that these cases were also submitted to the court with the approval of the defence especially in the context where your lawyer himself had been counsel in many of those cases. The court is satisfied that the proposed sentence will promote the objectives of denunciation, general and specific deterrence and rehabilitation.

[25] Counsel for the prosecution has asked the court to make an order prohibiting you from possessing weapons pursuant to s.147.1 of the *National Defence Act*. It must be noted that the parallel provision in s. 109(1)(c) of the *Criminal Code*, which deals with weapons prohibition order, would make it mandatory in similar circumstances. Of particular interest in this case is that you were already subject to a lifetime prohibition in relation to prohibited firearms, restricted firearms, prohibited weapons, prohibited devices and prohibited ammunition; and subject to a 10-year prohibition with respect to other firearms, restricted weapons, cross-bows, ammunition, and explosive substances. Despite the said order, you pointed a firearm to a fellow soldier and made a video of your conduct to show that you did not take the court order imposed on you seriously. There is no doubt that in these circumstances the court finds that it is now desirable in the interests of the safety of any other person that you should be prohibited from possessing any firearm, restricted weapon, cross-bow, ammunition, and explosive substance indefinitely now.

[26] As you were ordered to subject yourself to the taking of bodily samples for the purpose of forensic DNA when convicted by the Provincial Court of Alberta in January 2010, the court finds that it would be of little benefit to the justice system to subject you to a similar order today. I will not issue such DNA analysis under s. 196.14 (3) of the *National Defence Act*.

FOR THESE REASONS, THE COURT:

[27] **FINDS** you, ex-Private McKinnell, guilty of conduct to the prejudice of good order and discipline under s. 129 of the *National Defence Act* for use of cannabis (marihuana) contrary to article 20.04 of the Queen's Regulations and Orders for the Canadian Forces; guilty of trafficking in a substance included in Schedule II, to wit cannabis (marihuana) punishable under s. 130 of the *National Defence Act* contrary to subsection 5(1) of the *Controlled Drugs and Substances Act*; and guilty of pointing a firearm punishable under s. 130 of the *National Defence Act* contrary to subsection 87(1) of the *Criminal Code*.

[28] **SENTENCES** you to imprisonment for a period of 60 days.

[29] **PROHIBITS** you from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance, or all such things for a life period under s. 147.1 of the *National Defence Act*.

Counsel:

Lieutenant-Commander S. Leonard, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Me Denis Couture
Counsel for ex-Private D. McKinnell