



COURT MARTIAL

Citation: *R v Ogilvie*, 2013 CM 4025

Date: 20131010

Docket: 201309

Standing Court Martial

Canadian Forces Base Trenton
Trenton, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal D.M. Ogilvie, Offender

Before: Lieutenant-Colonel J-G Perron, M.J.

REASONS FOR SENTENCE

(Orally)

INTRODUCTION

[1] Corporal Ogilvie, having accepted and recorded your plea of guilty to charge number 1, the court now finds you guilty of this charge. Charge number 1, disobedience of a lawful command, was laid under section 83 of the *National Defence Act*. You had also initially pled guilty to charge 4, using insulting language to a superior officer, a charge laid under section 85 of the *National Defence Act*. The prosecutor withdrew the other two charges after your plea. But, after it heard a portion of your testimony during the initial sentencing phase of the trial, the court came to the conclusion the interests of justice required that your plea be changed to one of not guilty. A trial on that charge, to which you did not object, ensued and you were found guilty of that charge. The court must now determine a just and appropriate sentence in this case.

[2] The statement of circumstances, to which you formally admitted the facts as conclusive evidence of your guilt, provides this court with the some of the

circumstances surrounding the commission of these offences. Your testimony and the testimony of Warrant Officer Duggan and Sergeant Mulvihill provide the court with the other facts of this case.

[3] On 27 August 2012, you were informed by Warrant Officer Duggan that you would be on Duty Recovery for the long weekend. You told him that you could not do the task because you were taking medication to help you sleep. Warrant Officer Duggan informed you that you would have to do the task unless you had a medical chit from 24 Canadian Forces Health Services stating you couldn't perform the task.

[4] On 28 August 2012, you reported to Warrant Officer Duggan's office and informed him that 24 Canadian Forces Health Services had not provided you a medical chit. Warrant Officer Duggan then informed you that you would have to take the long weekend duty. Shortly after, another member of Corporal Ogilvie's unit, Master Corporal Kavanaugh, noticed that you were upset. Master Corporal Kavanaugh informed Sergeant Mulvihill that you were upset. Warrant Officer Duggan and Sergeant Mulvihill went outside to the fitness trail to see you.

[5] Warrant Officer Duggan and Sergeant Mulvihill walked to your location. You were sitting in the grass smoking a cigarette. Warrant Officer Duggan told you to stand up and extinguish the cigarette. You obeyed those orders. The conversation was described by Corporal Ogilvie, Warrant Officer Duggan and Sergeant Mulvihill as casual in the beginning but that it heated up as it progressed. Warrant Officer Duggan later told you to button up a button on your shirt and to stand to attention; you did not obey these orders. You were upset and angry with Warrant Officer Duggan and, as you testified, you walked away because you felt you might become involved in a physical altercation. You were walking away from Warrant Officer Duggan when you said "Fuck it, fuck you, charge me, I don't care."

[6] As indicated by the Court Martial Appeal Court, sentencing is a fundamentally subjective and individualized process where the trial judge has the advantage of having seen and heard all of the witnesses and it is one of the most difficult tasks confronting a trial judge. The Court Martial Appeal Court clearly stated that the fundamental purposes and goals of sentencing as found in the *Criminal Code of Canada* apply in the context of the military justice system and a military judge must consider these purposes and goals when determining a sentence. The fundamental purpose of sentencing is to contribute to respect for the law and the protection of society, and this includes the Canadian Forces, by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society where necessary;

- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

The court must determine if protection of the public would best be served by deterrence, rehabilitation, denunciation or a combination of those factors.

[7] The sentencing provisions of the *Criminal Code*, ss. 718 to 718.2, provide for an individualized sentencing process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender. A sentence must also be similar to other sentences imposed in similar circumstances. The principle of proportionality is at the heart of any sentencing. Proportionality means a sentence must not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence.

[8] The court must also impose a sentence that should be the minimum necessary sentence to maintain discipline. The ultimate aim of sentencing is the restoration of discipline in the offender and in military society. Discipline is one of the fundamental prerequisites to operational efficiency in any armed force.

[9] The prosecution suggests that the following principles of sentencing apply in this case; general and specific deterrence. The prosecution has provided this court with three cases in support of its submission that the minimum sentence in this matter is a severe reprimand and a fine in the amount of \$2,000.

[10] Defence counsel asserts a reprimand would be the appropriate sentence. When asked by the court what amount he would suggest should the court decide a fine is an appropriate punishment, he replied that a maximum amount of \$500 would be adequate.

[11] I will now set out the aggravating circumstances and the mitigating circumstances that I have considered in determining the appropriate sentence in this case. I consider the following circumstances to be mitigating:

- (a) you have pled guilty to one of the four charges found on the charge sheet. Therefore, a plea of guilty will usually be considered as a mitigating factor. This approach is generally not seen as a contradiction of the right to silence and of the right to have the prosecution prove beyond a reasonable doubt the charges laid against the accused but is seen as a means for the courts to impose a more lenient sentence because the plea of guilty usually means that witnesses do not have to testify and that it greatly reduces the costs associated with the judicial proceeding. It is also usually interpreted to mean that the accused wants to take

responsibility for his or her unlawful actions and the harm done as a consequence of these actions;

- (b) this mitigating factor has a certain weight in this case but it is lessened by the fact that you do not really accept full responsibility for your actions and your need to blame others for all that befalls on you. I will have more to say on this topic later. Also, contrary to what your counsel suggested, this plea did not really save much time and resources. But you did not withdraw your plea of guilty to charge number 1 and I will take this into consideration as a mitigating factor;
- (c) your actions were spontaneous as is the case in most of these types of situations. Your psychological difficulties did have a part to play in this situation and I will take them into consideration and I will expand upon this issue later in my decision;
- (d) paragraph 2 of article 112.48 of the *Queen's Regulations and Orders* provides that a court shall "take into consideration any indirect consequence of the finding or of the sentence." It appears that you will be released for medical reasons from the Canadian Forces in the near future. This is an administrative measure that is not directly related to the offences before this court; as such, it is not an indirect consequence of the finding of the sentence. I will not consider it a mitigating factor. I do not agree with your counsel that this medical release negates the need for specific deterrence when determining the appropriate sentence. I will again expand upon this later in my decision; and
- (e) I agree with your counsel there were no peers present when you committed these offences and there is no evidence of any prejudice to the general good order and discipline of your unit or the wing. You were not violent. You left before you completely lost control of yourself and I will give you credit for that.

[12] I will now address the aggravating circumstances:

- (a) the offence of disobeying a lawful command of a superior officer is objectively one of the most serious offences under the Code of Service Discipline since the maximum sentence is imprisonment for life. The offence of insubordination is objectively a serious offence since the maximum sentence is dismissal with disgrace from Her Majesty's service;
- (b) you chose to join the Canadian Forces and you know the importance of discipline, respect for the chain of command and following orders. The Court Martial Appeal Court had this to say on the significance of the offence of disobedience of a lawful command in *R. v. Liwyj*, 2010

CMAC 6 "the offence created by section 83 of the *National Defence Act* reflects the fact that obedience to orders is the fundamental rule of military life." It is the legal obligation of every member of the Canadian Forces to obey the lawful orders of a superior officer. (see article 19.015 of the Queen's Regulations and Orders)

- (c) however, these offences in the context in which they occurred are subjectively not as serious as other similar offences dealt with by courts martial. This statement should not be understood as condoning your behaviour. You basically decided to do as you wanted. While I am willing to accept that your psychological difficulties can be a factor in this case; your approach in attempting to deal with your psychological problems is not impressive;
- (d) you were practically 34 years old at the time of the offences and had been a soldier for 11 years and 7 months. You were promoted to your present rank in 2005. I do not agree with your counsel that you can be considered a youthful offender. You knew that this type of behaviour is not tolerated in the Canadian Forces. Basically, you were old enough and had enough experience to know better; and
- (e) you have a conduct sheet that contains two charges of AWOL (absence without leave). Thus, you are not a first time offender. Those charges are not identical to the charges before this court but they do demonstrate a lack of self-discipline on your part. Furthermore, your explanation of the 5 January 2012 charge again demonstrates your lack of acceptance of full responsibility for your actions;

[13] I agree with your counsel that Exhibit 20 confirms you were not fit to perform the duties you have been assigned. You testified that you had initially requested that the medical employment limitations (MEL) that were practically identical to those found at Exhibit 20 be removed in early 2012 because you wanted to deploy. Those MELs were again imposed on 29 August 2012. This might help understand the situation of 28 August but it does not excuse your conduct.

[14] I agree with your counsel that you are not as bad as portrayed by the prosecutor; one rarely is. I have carefully reviewed Exhibits 8 to 18; namely, four course reports, one Personnel Evaluation Report (PER), one letter of appreciation, three Personnel Development Reviews (PDR), one Recorded Warning and one Remedial Measure-Initial Counselling spanning the period 2001 to 2009. I would characterize two course reports (Exhibits 17 and 18), one PDR (Exhibit 16), one PER (Exhibit 12) and the letter of appreciation (Exhibit 13) as good to excellent reports of your performance. I would characterize two course reports (Exhibits 8 and 9), the Recording Warning (Exhibit 10) and the Remedial Measure-Initial Counselling (Exhibit 11) as unsatisfactory performance on your part. The PDRs you received from 1 Service Battalion and the Task Force Afghanistan 1-08 NSE (Exhibits 14 and 15) include very good comments in

the strengths section but indicate you "must endeavour to maintain your composure" (Exhibit 14) and that your "confrontational tendencies need to be channelled into solving problems instead of just complaining about them" (Exhibit 15) in the areas for development section.

[15] Exhibits 21 and 23 indicate that you were put on Counselling and Probation in September 2010 for a period of one year. I have not been provided any other information on your performance or behaviour in the way of PERs or PDRs for the period 2009 to today. You have managed to perform well in your career but some of the evidence, specifically the Recorded Warning, the Initial Counselling and Exhibits 8, 9, 14 and 15 confirms that you have always had difficulties with self-discipline and respect for lawful authority.

[16] I have carefully reviewed the two psychological assessment reports found at Exhibit 21 and 23. I strongly suggest you do the same. I will not quote from these reports but here is what they lead one to conclude: You are immature, cannot deal with your anger, tend to exaggerate your PTSD symptoms, have limited insight into your psychological difficulties and interpersonal problems and exhibit questionable motivation for treatment. You rely on rationalization, denial and you blame others for your problems.

[17] The psychiatrists have nothing to gain or lose in their assessment of you. They expressed some doubts as to your credibility based on interviews and your test results. You told Doctor Pollock that a 5f release would mean the loss of your military pension and other benefits. You also told Doctor Patterson that you were eager to leave the military but only if given a medical release. The medical system has offered you numerous opportunities to follow counselling sessions or specific programmes but you have failed to take advantage of those opportunities. Your history of workplace problems, specifically dealing appropriately with authority figures, started well before your deployment to Afghanistan.

[18] You firmly believe you suffer from PTSD and will react to anyone questioning your self-diagnostic. You might well be suffering from PTSD but the psychological reports have not been fully supportive of your views on this subject and the different psychiatrists have fully explained why they cannot unequivocally reach this diagnosis.

[19] I believe you when you say the experience of seeing people die had a severe effect on you. You said that you were looking in the eyes of a fellow soldier when he died. You were beside an Afghan policeman when he died from gunshot wounds. You had to live through rocket attacks on your FOB. You said there was no training in the Canadian Forces that can prepare you for that.

[20] Here is what I can tell you. I have held a person in my arms, looked in her eyes and saw her take her last breath. There is nothing in life that can prepare you for the emotional and psychological shock of seeing someone die. What you must do is deal with the situation and try and help yourself. The first step is to look at yourself in the

mirror and ask yourself whether you are truly trying to help yourself or whether you are finding excuses for your behaviour. You have people who care about you that can help you. The Canadian Forces medical system is there to help you. You have to take the first step. If you don't, your inability to control yourself will always cause you problems in life.

[21] You made choices and now have to assume responsibility for those choices. Although it is written in Doctor Patterson's report that punishment is not likely to change your behaviour, I have come to the conclusion that I must impose a sentence that will provide a clear message to you and to others that this type of conduct is unacceptable and that it is not the conduct we will accept on the part of a soldier. A lenient sentence, as suggested by your counsel, would only condone your behaviour and would reinforce your belief that you were not responsible for your actions. I have concluded that specific deterrence and denunciation are the main sentencing principles that need to be applied in the present case.

[22] At the same time, the court must impose the minimum necessary sentence that will maintain discipline. I have reviewed the case law presented by counsel and have come to the conclusion that the following sentence will assist you in taking responsibility for your actions and hopefully assist you in your rehabilitation.

FOR THESE REASONS, THE COURT:

[23] **SENTENCES**, Corporal Ogilvie, to a reprimand and a fine in the amount of \$1,000. The fine will be paid in monthly instalments of \$250 starting on 15 November 2013.

Counsel:

Lieutenant-Colonel K.A. Lindstein
Counsel for Her Majesty the Queen

Major S. Collins and Lieutenant (N) M. Baker, Directorate of Defence Counsel Services
Counsel for Corporal D.M. Ogilvie