COURT MARTIAL

Citation: *R v Bailey*, 2013 CM 4026

Date: 20131021
Docket: 201303

Standing Court Martial

Canadian Forces Station Shilo
Shilo, Manitoba, Canada

Between:

Her Majesty the Queen

- and -

ex-Private M.L. Bailey, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Ex-Private Bailey, having accepted and recorded your pleas of guilty to charges number one, two, and three, the court now finds you guilty of these charges laid under section 90 of the *National Defence Act*. 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 circumstances surrounding the commission of these offences. At the time of the offences, you were a member of 8 Platoon, 2nd Battalion, Princess Patricia's Canadian Light Infantry in Shilo, Manitoba.

[3] At 0700 hours on 4 June 2012, roll-call was given for your platoon and it was noted that you were not present. You arrived at 0740 hours, on 4 June 2012, at Kapyong Barracks. On 6 June 2012, 8 Platoon received a timing of 0720 hours for

Thursday, 7 June, at Kapyong Barracks. Later that morning you approached Warrant Officer Matthies and informed him that you were to report the next morning to sick parade to receive some test results. He instructed you to call the base hospital to determine whether it was possible to wait until the following Monday to receive the test results so that you would not miss parade practise. You were to report back to the warrant officer if you were unable to wait for the test results.

[4] On 7 June 2012, at approximately 0710 hours, you called Corporal Hillier at the 8 Platoon offices to tell him you had an appointment at the base hospital at 0730 hours that day. On 7 June 2012, at 0930 hours, Corporal Nadasny, a member of 8 Platoon, was instructed to follow-up and ensure that you had a scheduled appointment at the base hospital. He contacted the base hospital and the dental clinic on base and confirmed you had no scheduled appointments that morning.

[5] Corporal Nadasny then tasked Corporal Hillier and Corporal Welch to check your room, located in building L-101 at CFB Shilo, to determine whether you were there. At 0940 hours, Corporal Hillier and Corporal Welch knocked on your door. They received no answer and proceeded to enter the room where they found you sleeping. You were instructed to report to 8 Platoon, which you did at 1000 hours.

[6] On 23 November 2012, at 0745 hours, the members of 8 Platoon had a morning parade. You failed to be present at that parade. Sergeant Hurley was tasked to locate you. Sergeant Hurley called your cellphone five times, but did not receive an answer. He checked with other members of your platoon, but was advised that no one had seen you. At 0846 hours, Sergeant Hurley and Master Corporal Nepinak went to check your room to determine if you were there. They found you still in bed and noted that you smelled of alcohol and that there were approximately 10 to 15 empty beer cans on the coffee table. They instructed you to get dressed and shaved and return to 8 Platoon at Kapyong Barracks, which you did at 0900 hours.

[7] Having reviewed the main facts of this case, I will now determine the sentence. As indicated by the Court Martial Appeal Court, sentencing is a fundamentally subjective and individualized process and it is one of the most difficult tasks confronting a trial judge.

[8] 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 sentence. The fundamental purpose on 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 to the community; and

(f) to promote a sense of responsibility in offenders and acknowledgment 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.

[9] The sentencing provisions of the *Criminal Code*, sections 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.

[10] 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.

[11] The prosecution and your defence counsel have jointly proposed a sentence of imprisonment for a period of 10 days and a fine in the amount of $500. They also propose that I suspend the execution of the sentence of imprisonment. The Court Martial Appeal Court has stated clearly that the sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or unless the sentence is otherwise not in the public interest. The prosecutor argues the principles of sentencing of general deterrence and rehabilitation should be considered by the court and she has offered one case to support the proposed sentence.

[12] 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 to be aggravating:

(a) section 90 of the *National Defence Act* is not objectively as serious as a number of other offences in the *National Defence Act* since one can be sentenced to imprisonment for less than two years or to lesser punishment in the scale of punishments. You were absent for 40 minutes, two hours and forty minutes, and one hour and fifteen minutes respectively. Your absences display a lack of respect for your chain of command and for discipline. They caused unnecessary work for your fellow soldiers

and were an additional administrative burden for your chain of command. Subjectively, these offences are not the most serious examples of absence without leave, but they did have a negative effect on your fellow soldiers and on your chain of command; and

(b) you have a conduct sheet. In the short period of time you were a member of the Canadian Forces you were tried summarily on two occasions, in April 2011 and May 2011. You were found guilty by the Manitoba Provincial Court of operating a vehicle while impaired by alcohol in August 2011. Your conduct sheet contains two charges of absence without leave and one charge of drunkenness. It is quite a busy conduct sheet for a private. It does demonstrate you had problems with alcohol and self-discipline.

[13] As to the mitigating circumstances, I note the following:

(a) you have pled guilty; therefore, a plea of guilty and cooperation with the police will usually be considered as mitigating factors. 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 court 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) you were 24 years old and had served in the Canadian Army for only three years at the time of the offences. As such, I will consider you a youthful offender and your inexperience as a member of the Army will be considered a mitigating factor, but is tempered by your conduct sheet; and

(c) you requested your release from the Canadian Forces and it was granted on 6 August 2013 under item 4C, On Request – Other Reasons; thus you were honourably released. You are presently employed by an eavestroughing company as a labourer. You work 40 hours a week and are paid $14 per hour. You share an apartment with your girlfriend and you pay your share of the rent. You have many debts that amount to approximately $9,000 and have a plan to pay these debts. You also wish to work locally until you have enough money to go seek more lucrative employment in Northern Alberta.

[14] There appears to have been a delay of a few months, two or three, because defence counsel had requested that a summary trial presided by your commanding officer be reviewed and quashed. The request was made on 15 May 2013 and the Commander

of the Canadian Army quashed that summary trial on 15 October 2013. While I agree with your counsel that this issue, the review and quashing of that summary trial, is an important issue during the sentencing process of this trial, I do not agree it may be considered a mitigating factor since I have not been provided any evidence demonstrating it had any negative impact on you or the procedures.

[15] I agree with counsel this case is one where incarceration is an appropriate punishment. This is a case where detention is the appropriate punishment for an offender who is still a member on the Canadian Forces. The Court Martial Appeal Court in *ex-Private St-Onge v R*, 2010 CMAC 7 stated the following at paragraphs 58 and 59:

> [58] The sentence in question in *Tupper* included a period of detention. In the military context, detention is a form of incarceration which has a specific objective of rehabilitation of the offender as a member of the Canadian Forces. This is clearly set out in the note to section 104.09 of the QR&O which provides as follows:
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> > (A) In keeping with its disciplinary nature, the punishment of detention seeks to rehabilitate service detainees, by re-instilling 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 member from other members of society. Specialized treatment and counselling programmes to deal with drug and alcohol dependencies and similar health problems will also be made available to those service detainees who require them. Once the sentence of detention has been served, the member will normally be returned to his or her unit without any lasting effect on his or her career.

At paragraph 59 the court wrote:

> [59] On the other hand, imprisonment, in the military context, is seen as a prelude to the return of an offender to civil society. This also is made clear in the notes to the relevant provision of the QR&O, in this case, section 104.04:
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> > (B) Service prisoners and service convicts typically require an intensive programme of retraining and rehabilitation to equip them for their return to society following completion of the term of incarceration. Civilian prisons and penitentiaries are uniquely equipped to provide such opportunities to inmates. Therefore, to facilitate their reintegration into society, service prisoners and service convicts who are to be released from the Canadian Forces will typically be transferred to a civilian prison or penitentiary as soon as practical within the first 30 days following the date of sentencing. The member will ordinarily be released from the Canadian Forces before such a transfer is effected.

[16] A serving member in ex-Private Bailey's exact situation could well be sentenced to detention. The purpose of that sentence would be to make the offender a more disciplined soldier. The Court Martial Appeal Court has indicated that CF members who have been released by the CF could not be sentenced to detention since detention no longer served a military objective once the offender was released. Hence the only type of incarceration available in this case would be imprisonment. However, imprisonment

does not appear to be the appropriate punishment in this case when one considers the facts of this case. It is, in fact, a substitute for detention.

[17] In *ex-Private St-Onge v R*, 2010 CMAC 7 and *Private Tupper v R*, 2009 CMAC 5, these two cases pertain to sentencing offenders who have been released from the Canadian Forces. Neither of these cases involve a voluntary release; Tupper was released under item 2(a) and St-Onge was released under item 5(f).

[18] I find that counsel's joint sentence tries to navigate the needs of discipline within the present case law from the Court Martial Appeal Court. General deterrence requires that a sentence of incarceration be imposed. Detention would be the appropriate sentence had it not been for the present status of the accused. Imprisonment is the only other form of incarceration presently available to the court, but a period of actual incarceration would penalize ex-Private Bailey much more in his present situation than if he had been a serving member since a private sentenced to detention would continue receiving his pay while ex-Private Bailey will not be paid by his civilian employer.

[19] The suspension of a punishment of detention has basically the same effect on the offender as the suspension of the punishment of imprisonment. The offender does not have to serve his or her punishment unless the conduct of the offender has been such as to justify a remission of the punishment.

[20] You are in a precarious financial situation and you are attempting to rectify the mistakes you have done in the past. The amount of a fine must take into consideration the offender's ability to pay as well as the impact it would have on the offender. Specific deterrence is not required in this case.

[21] I have concluded that general deterrence and rehabilitation are the main sentencing principles that need to be applied in the present case. Having reviewed the totality of the evidence, the jurisprudence and the representations made by the prosecutor and your defence counsel, I have thus come to the conclusion that, in the specific circumstances of this case, the proposed sentence is the minimum necessary sentence for the purposes of discipline. I also conclude that this sentence would not bring the administration of justice into disrepute and that the proposed sentence is in the public interest. Therefore, I agree with the joint submission of the prosecutor and of your defence counsel. A suspended sentence of imprisonment and a $500 fine will also assist you in your rehabilitation.

FOR THESE REASONS, THE COURT:

[22] **SENTENCES** ex-Private Bailey to imprisonment for a period of 10 days and a fine in the amount of $500, and orders the carrying into effect of the punishment of imprisonment to be suspended.

Counsel:

Lieutenant-Commander S. Torani, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Lieutenant-Commander B.G. Walden, Directorate of Defence Counsel Services
Counsel for ex-Private M.L. Bailey