



COURT MARTIAL

Citation: *R v Near*, 2013 CM 4018

Date: 20130905

Docket: 201357

Standing Court Martial

Asticou Centre Courtroom
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Corporal R.A.G. Near, Offender

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

REASONS FOR SENTENCE

(Orally)

INTRODUCTION

[1] Corporal Near, having accepted and recorded your plea of guilty to charge number two, the court now finds you guilty of this charge laid under section 97 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 this offence. At the time of the offence you were a member of the Governor General's Foot Guards. On 14 April 2012, Corporal Near was working on a Class A service as General Duty for the Army Ball held at the Casino Lac Leamy in Gatineau, Quebec. Corporal Samson was supervising the General Duty Personnel (GDs). Just after 2200 hours, the dinner was done and Corporal Near and Corporal Valcour were tasked to hand out gift bags to the guests. A volunteer who also worked

at handing out gift bags saw Corporal Near leaving the area with a bottle of champagne she suspected was from a gift bag and advised him that they were not allowed to do that.

[3] Later that evening, Corporal Samson was walking downstairs where the ballroom was and noticed Corporal Near at the bottom of the elevator near the ballroom drinking from a mini-bottle of champagne while still in uniform. When told by Corporal Samson that he was not allowed to drink the bottle of champagne, Corporal Near drank the rest of the bottle.

[4] Corporal Samson was then briefed by two civilian volunteers about what they had observed. Corporal Near and Corporal Valcour left the area without Corporal Samson's permission. As a consequence, the remaining GDs tore down the ball without the help of Corporal Near and Corporal Valcour.

[5] At 0210 hours on 15 April 2012, Corporal Samson contacted Corporal Near via cellphone. Corporal Samson informed Corporal Near that all GDs were ready to go and were waiting for him and Corporal Valcour. Corporal Samson noticed that Corporal Near was intoxicated. Corporal Near advised Corporal Samson that they would take a taxi.

[6] Corporal Near admitted in a cautioned interview that he grabbed a few mini-champagne bottles and he admitted drinking the bottles of champagne.

[7] Having reviewed the main facts of this case I will now determine the sentence. As indicated by 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 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 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.

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

[10] 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 that 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.

[11] 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 the military society. Discipline is one of the fundamental prerequisites to operational efficiency in any armed force.

[12] The prosecution and your defence counsel have jointly proposed a sentence of a fine in the amount of \$200. The Court Martial Appeal Court has stated clearly that a 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.

[13] 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 97 of the *National Defence Act*, drunkenness, is objectively not one of the most serious offences found in the Code of Service Discipline since one can be sentenced to imprisonment for less than two years or to lesser punishment on the scale of punishments, however, this offence is subjectively serious since you chose to drink to the point of impairment while you were on duty. Your behaviour also brought discredit upon the Canadian Army and the Canadian Armed Forces;
- (b) although one must consider the nature of the duty you were performing at the time of the offence, this behaviour is nonetheless unacceptable. You showed a total lack of self-discipline and of respect for your duty and your superior. This is not the type of behaviour we in the Canadian Forces and in Canadian society expect of our soldiers;
- (c) you were 28 at the time of the offence and had been in the Canadian Forces for six years. You had enough experience to know that such be-

haviour is not tolerated in the Canadian Forces. Basically, you were old enough and had enough experience to know better.

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

- (a) you do not have a conduct sheet, therefore, you are a first time offender. You have pled guilty. 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 charge 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) I have reviewed Exhibit 7, which contains reference letters, a performance development review and two course reports. Your performance is rated as excellent and you show leadership potential. This evidence appears to demonstrate this incident is an error that is out of character and should not happen again;
- (c) I find the delay quite disturbing. A corporal gets drunk while on duty at the Army Ball in April 2012 and fails to follow the orders of his superior. It takes approximately eight months for the unit to lay charges and then three months for the referral authority to forward these charges to the Director of Military Prosecutions. The charge sheet is produced in July 2013 and a trial is held in September 2013. How can this delay be beneficial for Corporal Near and for discipline within the Governor General's Foot Guards, the Canadian Army and the Canadian Forces? The answer is simple, it is not;
- (d) I have not been provided more information on this delay. This appears to be a situation where a charge is laid soon after the incident and tried by summary trial within the unit should the circumstances permit such a trial. It would have been much more beneficial for discipline than a court martial 17 months after the fact. As such, I will consider this delay as an important mitigating factor

[15] I have concluded that denunciation is the main sentencing principle that needs 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 come to the conclusion that the proposed 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.

FOR THESE REASONS, THE COURT:

[16] **FINDS** you guilty of the second charge, for an offence under section 97 of the *National Defence Act*.

[17] **SENTENCES** you to a fine in the amount of \$200.

Counsel:

Major A-C. Samson
Counsel for Her Majesty the Queen

Mr Norman Boxall, Bayne Sellar Boxall
200 Elgin St, Suite 500, Ottawa, ON K2P 1L5
Counsel for Corporal R.A.G. Near