COURT MARTIAL

Citation: *R. v. Zammitti*, 2010 CM 3024

Date: 20101115
Docket: 201040

Standing Court Martial

Canadian Forces Base Gagetown
Oromocto, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

ex-Private S.J. Zammitti, Offender

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Private Zammitti, having accepted and recorded a plea of guilty in respect of the fourth and sixth charge on the charge sheet, the court now finds you guilty of these charges. The prosecutor having withdrawn the first, second, third and fifth charge, then the court is left with nothing else to deal with.

[2] It is now my duty as the military judge who is presiding at this Standing Court Martial to determine the sentence.

[3] The military justice system constitutes the ultimate mean 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 trusting 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 in the same way as any other person living in Canada.

[4] It has been long recognized that the purpose of a separate system of military justice or tribunal 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 the 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: "impose a sentence commensurate to the gravity of the offence and the previous character of the offender," as stated at QR&O 112.48 (2)(*b*).

[5] Here in this case, the prosecutor and the offender's defence counsel made a joint submission on sentence to be imposed by the court. They recommended that this court sentence you to imprisonment for a period of 30 days in order to meet justice requirements. They also suggested to the tribunal to suspend the carrying into effect of the punishment.

[6] Although this court is not bound by this joint recommendation, it is generally accepted that a court should not depart from it unless it has cogent reasons such as it is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.

[7] Imposing a sentence is the most difficult task for a judge. As the Supreme Court of Canada recognized in *R. v. Généreux*[1], "To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently." It emphasized that, in the particular context of military justice, "breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct." However, the law does not allow a military court to impose a sentence that would be beyond what is required in the circumstances of a case. In other words, any sentence imposed by a court must be adapted to the individual offender and constitute the minimum necessary intervention, since moderation is the bedrock principle of the modern theory of sentencing in Canada.

[8] The fundamental purpose of sentencing in a Court Martial is to ensure respect for the law and maintenance of discipline by imposing sanctions that have one or more of the following objectives:

a. to protect the public, which includes the Canadian Forces;

b. to denounce unlawful conduct;

c. to deter the offender and other persons from committing the same offences;

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[1] [1992] 1 S.C.R. 259

d. to separate offenders from society, where necessary; and

e. to rehabilitate and reform offenders.

[9] When imposing sentences, a military court must also take into consideration the following principles:

a. a sentence must be proportionate to the gravity of the offence;

b. a sentence must be proportionate to the responsibility and previous character of the offender;

c. a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

d. an offender should not be deprived of liberty, if applicable in the circumstances, if less restrictive sanctions may be appropriate in the circumstances. In short, the Court should impose a sentence of imprisonment or detention only as a last resort, as it was established by the Court Martial Appeal Court and the Supreme Court of Canada; and,

e. lastly, all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[10] I came to the conclusion that in the circumstances of this case, sentencing should focus on the objectives of denunciation, general deterrence, and rehabilitation.

[11] Here the court is dealing with an offence for a conduct to the prejudice of good order and discipline contrary to section 129 of the *National Defence Act*, which is to have consumed alcohol contrary to C Squadron Rules and Directives while on the grounds surrounding living quarters at building H3 on CFB Gagetown, and with an offence for being absent without leave contrary to section 90 of the *National Defence Act*, which is for being absent from the Armour School at CFB Gagetown for 53 days, from 18 January to 11 March 2010. They are serious specific military offences per se as defined in the *National Defence Act*, and they involve Canadian Forces principles such as obey and support lawful authority and rely on Canadian Forces ethic obligations such as integrity, loyalty, and responsibility.

[12] In arriving at what the court considers a fair and appropriate sentence, the court has considered the following mitigating and aggravating factors:

a. The court considers as aggravating the objective seriousness of the offences. The offences you were charged with were laid in accordance with section 90 and 129 of the *National Defence Act*. These offences are punishable respectively by an imprisonment for a term not exceeding

two years for the AWOL and to dismissal with disgrace from Her Majesty's service for the conduct to prejudice to good order and discipline, or to less punishment.

b. Secondly, the subjective seriousness of the offences in that for the court it covers three aspects:

i. You gave up your responsibilities as a soldier. You decided that you will pass yourself before anything else without paying attention to the consequence of your decision. You let your unit dealt with the impact of your absence without a regret at the time. You also made clear that you were unreliable as a soldier, by drinking in a place where you were not allowed to, and by deciding to not come back to your place of duty, which is unacceptable at any time.

ii. The length of your absence discloses a clear recklessness attitude and a lack of care for the people and the organization, such as the Canadian Forces, you left behind. You might have grievance to raise or good reasons to complain, but making on your own the decision for not coming back to your place of duty without a warning to anybody, does not constitute an appropriate way to do things. As you have seen later, consideration was given to your situation because instead of arresting you, a decision was made by some Canadian Forces authorities to detach you to a unit closer to home.

iii. Finally, despite the fact that you were convicted and sentence for the same matter, you decided to commit the exact same offence, which is AWOL, for a longer period of time. The repetitive aspect of such conduct is an aggravating factor. In addition to that, you were convicted by a civilian tribunal for obstructing a peace officer, for uttering threats and for falling to comply with a condition of recognizance within a period of nine months over the fall 2009 and spring 2010.

[13] The court considers that the following circumstances mitigate the sentence:

a. First, there is your guilty plea. Through the facts presented to this court, the court must consider your guilty plea as a clear genuine sign of remorse and that you are very sincere in your pursuit of staying a valid asset to the Canadian society and it also disclose the fact that you are taking full responsibility for what you did. You also confirmed to the court, during your testimony, that you sincerely regret what you did and you did not deal properly with what was going on into your life at that time.

b. The fact that you recognize right away after you turned yourself in, that your conduct was totally inappropriate. You fully cooperated with the police investigators and admitted what you did.

c. Your age and your career potential as a member of the Canadian community; being 20 years old, you have many years ahead to contribute positively to Canadian society.

d. The fact that you had to face this Court Martial, which was announced and accessible to the public and which took place in the presence of some of your colleagues, has no doubt had a very significant deterrent effect on you and on them. The message is that the kind of conduct that you displayed will not be tolerated in any way and will be dealt with accordingly.

e. Your sincere desire and sustained efforts to amend your ways. You are aware of the problem you are dealing with, which is controlling your anger and the consumption of alcohol, and while being forced in a way to follow a therapy as a condition put by a tribunal, you are seeing this as the positive response that you were looking for over a year from the military organization. Moreover, since you were released from the Canadian Forces, you found a job on a full time basis, got an apartment that you are sharing with your girlfriend, and you are heavily supporting your grandmother on her daily life challenges.

f. Your release from the Canadian Forces under Item 5(*f*). Even though that does not constitute a sentence in and of itself, it is important to understand that your release from the Canadian Forces was an administrative sanction for your conduct underlying the offences of which you have been found guilty. Your exclusion from the Canadian Forces sends a clear deterrent message to all members that such conduct can lead to this kind of consequence.

[14] Concerning the fact for this court to impose a sentence of incarceration to Private Zammitti, as I mentioned earlier, the court should impose a sentence of imprisonment or detention only as a last resort, as it was established by the Court Martial Appeal Court[2] and the Supreme Court of Canada[3].

[15] Considering the nature of the offences, the aggravating factors, such as the existence of a previous conviction for the same offence, the length of the AWOL, and the other convictions by a civilian tribunal for criminal matters related to the respect of the people and the authorities, and also the tentative of re-instilling in the offender 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

[2] *R.* v. *Baptista*, 2006 CMAC 1, at paragraphs 5 and 6
[3] *R.* v. *Gladue*, [1999] 1 S.C.R. 688 at paragraphs 38 and 40

from other members of society by sentencing him to 21 days of confinement to barracks pursuant to a first conviction for AWOL, 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 counsels through their joint submission.

[16] Now, what would be the appropriate type of incarceration in the circumstances of this case? The military justice system has disciplinary tools such as detention, which seeks to rehabilitate service detainees and re-instil in them the habit of obedience in a military framework organized around the values and skills unique to members of the Canadian Forces. However, in the case of a member of the Canadian Forces who has already been released, the objectives of a sentence of detention are no longer relevant, and the remaining form of incarceration specified in the scale of punishments, which is imprisonment, must be considered. It seems clear to this court that incarceration in the form of imprisonment is the only appropriate sanction and that there is no other sanction or combination of sanctions that is appropriate for the offence and the offender.

[17] Concerning the length, the court considers that this situation would warrant imprisonment for a period of 30 days, as it did in *Dupuis*[4] because it is very similar to this case. Therefore, counsel's joint submission that the court imposes a sentence of imprisonment for a term of 30 days is reasonable in my view, given the context of this case.

[18] Both counsel suggested that the court suspends the sentence as it has the authority to do so pursuant to section 215 of the *National Defence Act*. The suspension of imprisonment by a service tribunal does imply the suspension of the carrying into effect of this punishment. So, basically, the offender would not serve any incarceration. Then, evidence must be put before this court in order to disclose any exceptional circumstances that would justify it, on a balance of probabilities, to suspend the sentence of imprisonment.

[19] Private Zammitti clearly mentioned that he got a temporary job with a manufacturer in Belleville. He experienced once the fact to not show up at his job and he was clearly told that if it happens again, he will be easily replaced. He is managing his life in order to reorient the way he does things, such as not drinking alcohol for the last ten months and managing properly his anger. He is sharing an apartment with his girlfriend in his hometown close to his parents and his grandmother, which means that he is actually living in a well supportive environment in order to help him to go through all his challenges and to allow him to help others at the same time. As concluded by the civilian judge dealing with other criminal matters, who came to the decision that probation would serve better the offender than to passing a sentence and put him in jail, and relying on some excerpt from the pre-sentential report quoted by the offender in his testimony, I conclude that the evidence put before this court discloses exceptional circumstances that would justify, on a balance of probabilities, to suspend the sentence of imprisonment.

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[4] *R. v. Dupuis*, 2010 CM 3005

[20] Private Zammitti, you joined the Canadian Forces with some goals and hopes you wanted to achieve. Meanwhile, you had to struggle with some personal issues and your call for help was not entirely heard. You failed in some ways to manage properly the situation and I hope that you learned some thing that will help you to enjoy life as it supposed to be. You're doing well so far, and I encourage you to continue to do so.

[21] A just and equitable sentence should take into account the seriousness of the offences and the offender's degree of responsibility in the particular circumstances of the case. Therefore, considering that no other sanction or combination of sanctions is appropriate to the offences and the offender in this case, the court is of the opinion that the joint submission is reasonable in the circumstances. Accordingly, it will accept the recommendation made by counsel to sentence you to imprisonment for a term of 30 days, considering that this sentence is not contrary to the public interest and would not bring the administration of justice into disrepute.

[22] Private Zammitti, please stand up. Therefore the court sentences you to imprisonment for a period of 30 days. However, the carrying into effect of this punishment is suspended by this court in accordance with section 215 of the *National Defence Act*.

Counsel:

Major P. Rawal, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Captain S.L. Collins, Directorate Defence Counsel Services
Counsel for ex-Private S.J.C. Zammitti