



COURT MARTIAL

Citation: *R. v. Prosser*, 2010 CM 3023

Date: 20101108

Docket: 201052

Standing Court Martial

Canadian Forces Base Borden
Borden, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Master Warrant Officer D.J. Prosser

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

REASONS FOR SENTENCE

(Orally)

[1] Having accepted and recorded a plea of guilty in respect of the second charge on the Charge Sheet with the concurrence of the prosecutor, the court now finds you guilty of this charge. Also, I'm directing that the proceedings on the first charge are stayed and considering that the prosecution has withdrawn the third charge then the court has no other charge to deal with.

[2] It is now my duty as the military judge who is presiding 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 to 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 the 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 tribunals 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 moral 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 sentences you to a reprimand and a fine to the amount of 1500 dollars in order to meet justice requirements.

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

[7] 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.

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

- (a) To protect the public this includes the Canadian Forces;
- (b) Denunciation, to denounce unlawful conduct; deter the offender and other persons from committing the same offence;
- (c) Separate offenders from the society where necessary; and,
- (d) Rehabilitate and reform offenders.

[9] When imposing a sentence the military judge must also take into consideration the following principles:

- (a) The sentence must be proportionate to the gravity of the offence;
- (b) The sentence must be proportionate to the responsibility and previous character of the offender;
- (c) The 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 the last resort as it was established by the Appeal Courts, Court Martial Appeal Court and the Supreme Court of Canada;
- (e) Lastly, sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[10] In this case on the 4th of March, 2010, a training mess dinner took place in order to introduce junior NCMs to proper mess dinner etiquette and protocol that evening. Lots of alcohol was consumed. The offender, Master Warrant Officer Prosser, touched the victim's breast over her tunic with inappropriate comments. The victim was shocked and, I would say, disoriented and she complained the day after.

[11] As evidence the court heard the testimony of the victim, Corporal Bordage, and the usual documents in order to provide some background about the offender, that were introduced by the prosecution.

[12] The main objective that the court must rely on in this specific case is the denunciation and general deterrence in these circumstances.

[13] In arriving at what the court considers a fair and appropriate sentence the court has considered the following mitigating and aggravating factors. The court considers as aggravating:

- (a) The objective seriousness of the offence, the offence you were charged with was in accordance with section 95 of the *National Defence Act*. This offence is punishable by an imprisonment for less than two years or to less punishment.
- (b) Secondly, the subjective seriousness of the offence and for the court it covers three aspects:

First, there is the breach of trust. Confidence is a key component between superiors and subordinates. Without it, accomplishment of any military mission or task is clearly jeopardized. All Canadian Forces members have a special responsibility for the defence of Canada and it is fulfilled through our commitment to some principles and obligations such as the respect of dignity of all persons which reflect one of our fundamental principles in our society embedded in our *Charter of Rights and Freedoms*. There are also obligations such as integrity, honesty and responsibility.

You had, as a supervisor at the rank of master warrant officer, to care about the well-being of those put under your responsibility and on 4 March 2010 you failed to do so. Your experience, your training including the one you received especially on harassment should have prevented you to do what you did, but it didn't.

Your unexpected behaviour during that night had a huge impact on the victim, Corporal Bordage. She was shocked, disoriented and it resulted in an untrusted working relationship that ended by moving her from her work environment. People couldn't believe that you did such things and she had to endure for some time the fact that she was the one who acted wrongly while it was never the case. There were rumours and conjectures and it had some psychological trauma on her.

There is also the context. This mess dinner was set up for training purposes and the way you behaved didn't reflect this at all. This thing happened not just between you and Corporal Bordage, but in front of somebody else, some peers. Basically, considering the context you failed to be an example.

[14] There are also mitigating factors that the court has considered:

(a) First, 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 for the Canadian Forces and the Canadian society. It also discloses the fact that you're taking full responsibility for what you did. The reality is that from the beginning after you realized what you did you clearly told everybody that you were taking full responsibility for what happened.

(b) Also the court considers as a mitigating factor the fact that there is no inscription on your conduct sheet or the absence of any criminal record for a similar matter.

(c) Your experience in your career in the Canadian Forces, you have progressed very well so far and it looks like that you were, up to that time, well respected in your rank as a master warrant officer and in your trade.

(d) There is the fact that it is an isolated incident, out of character. It was unusual for you, considering the 30 years you spent in the Canadian Forces to do something like this.

(e) Alcohol is not an excuse, but it helps to understand why such things happened. Also, the court has no indication that you have a problem with the consumption of alcohol.

(f) You also had to face this court martial. I'm pretty sure that it had already some deterrent effect on you, but also, and I expect, also on others.

(g) Also, your guilty plea will result with the fact that you'll get a criminal record, meaning by this that you will have to go through the process of Pardon and you will be able to do this only three years after the sentence is paid in full, I would say.

[15] I reviewed the case law and the appropriate range for such offence is from a fine to a severe reprimand and a fine. Case law showed that, what is suggested by counsel is not unreasonable in the circumstances of this case.

[16] Corporal Bordage, I heard clearly what happened about the way you were treated by the chain of command. For sure the court may have some concerns about this, however it has not enough element to make any comments or suggestions, but for sure when such things happen it has to be taken seriously by the chain of command. I cannot say anything about the way things occurred and the fact that in this case the complainant was removed from her position to another one because I don't have all the facts. But each time, and I just want to highlight this fact, each time that such thing happens that somebody complains about such thing, it has to be taken very seriously. And I'm not saying that it was not in this case, but for sure it has impacted especially on the working relationship not just on the complainant or the potential offender, but also on the people working with those persons. So the chain of command has to be very careful each time.

[17] Master Warrant Officer Prosser, please stand up. The court accepts the joint submission made by counsel considering that it is not contrary to the public interest and will not bring the administration of justice into disrepute.

Therefore the court sentences you to a reprimand and a fine to the amount of 1500 dollars. The fine is to be paid in monthly instalments of 250 dollars each commencing on the 1st of December, 2010, and continuing for the following six months. If the total amount is not paid before your release from the Canadian Forces, if you're released from the Canadian Forces at any point of time, then the outstanding amount will have to be paid in full the day prior to your release.

Counsel:

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