COURT MARTIAL

Citation: *R. v. Thibault*, 2010 CM 3022

Date: 20101018
Docket: 201023

Standing Court Martial

Canadian Forces Base Valcartier
Courcelette, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer J.F.C. Thibault, offender

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

OFFICIAL ENGLISH TRANSLATION

REASONS FOR SENTENCE

(Orally)

[1] Warrant Officer Thibault, the Court Martial having accepted and recorded your plea of guilty to the third and fourth charges, the Court now finds you guilty of both of those charges and, since the sixth charge was an alternative to the third charge, the Court directs a stay of proceedings on the sixth charge. Now, the first, second and fifth charges having been withdrawn by the prosecution before the trial began, there are no further charges to be dealt with by the Court.

[2] It now falls to me, as the military judge presiding at this Standing Court Martial, to determine the sentence.

[3] In the special context of an armed force, the military justice system constitutes the ultimate means of enforcing discipline, which is a fundamental element of military activity in the Canadian Forces. The purpose of this system is to prevent misconduct, or,

in a more positive way, to promote good conduct. It is through discipline that an armed force ensures that its members perform their missions successfully, confidently and reliably. The military justice system also ensures that public order is maintained and that those subject to the *Code of Service Discipline* are punished in the same way as any other person living in Canada.

[4] Imposing a sentence is the most difficult task for a judge. The Supreme Court of Canada recognized in *R. v. Généreux*[1] that, and I quote, "[t]o 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, "[b]reaches 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, be it civilian or military, 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.

[5] In this case, the prosecution and defence counsel have presented a joint submission on sentencing. They have recommended that the Court sentence you to a severe reprimand and a fine in the amount of $2,000. The Court Martial is not bound by this recommendation; however, it is well established in case law that there must be compelling reasons for the Court to disregard it. It is also generally recognized that the Court should accept the recommendation unless doing so would be contrary to the public interest or bring the administration of justice into disrepute.

[6] The fundamental purpose of sentencing in a Court Martial is to ensure respect for the law and the maintenance of discipline by imposing punishments 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;

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

e. to rehabilitate and reform the offender.

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

a. proportionality of a sentence to the gravity of the offence;

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

b. the degree of 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. the Court has a duty, before considering depriving an offender of liberty, to consider whether 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; and

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

[8] The Court is of the opinion that sentencing in this case should focus on the objectives of denunciation and general and specific deterrence. It is important to remember that the principle of general deterrence means that the sentence imposed should deter not only the offender from re-offending, but also others in similar situations from engaging in the same prohibited conduct.

[9] In this case, the Court must rule on two offences of negligent performance of a military duty. Essentially, from what I understand of the circumstances, on June 8, 2009, Warrant Officer Thibault was on a mission in Afghanistan and was given a very specific duty by his platoon commander: to direct and supervise a small arms and M-72 range. Warrant Officer Thibault was responsible for one of the two ranges, since the lieutenant had to take care of the other one in the same area. And while a master corporal, Master Corporal Cyr, was firing a C-7 assault rifle, Warrant Officer Thibault threw a grenade, a "sound and flash grenade nine banger", at the firer's feet. The detonation is designed to confuse firers' hearing and sight, usually, and that is what happened, but the firer managed to remain in control of his weapon.

[10] As the assistant range officer, Warrant Officer Thibault did not—he failed to ensure his compliance with the standards learned in training for such a situation. He had certainly not received an exemption to act as he did. That same day, without supervision, Warrant Officer Thibault grabbed an M-72 and fired a first and even a second shot at a wooden palette on the range without making sure that the area was clear in accordance with the applicable safety standards, that is, for about 250 m. Some persons were 30 m away. Furthermore, in terms of the circumstances, when Warrant Officer Thibault fired those shots, he was the highest ranking officer and in charge of the range.

[11] Warrant Officer Thibault, you understand that the courts are sensitive to this type of offence, even if it is typically military as your counsel made a point of emphasizing, because when persons are charged and found guilty of such offences under the *Code of Service Discipline*, they are among the most serious offences. In that

sense, they are serious for different reasons. You are aware that military members are guided by objectives, by principles, and one of those principles is respect—respect for peoples' integrity, respect for others and, in the circumstances described, it is quite clear that this was not one of the things guiding you right then. As such, this type of offence is related to responsibility and integrity. You recall that I explained to you and to your counsel the notion of marked departure with respect to the nature of negligence, and we spoke of criminal negligence. And, when such an offence is brought before a military court, there's no doubt that this comes to the Court's mind, as well as the obligations of responsibility and integrity. Within the Canadian Forces, being reliable and trustworthy is essential, particularly in the circumstances of the incidents. And I believe that at that moment, it was—let's say it was the least of your concerns.

[12] In arriving at what it considers a fair and appropriate sentence, this Court must consider the following mitigating and aggravating factors. Objectively, in terms of objective seriousness, which I spoke of briefly, to situate it on a scale of the most serious offences, I must state that section 124 of the *National Defence Act* is a serious offence because, objectively speaking, the maximum sentence is dismissal with disgrace from Her Majesty's service or less punishment. In terms of subjective seriousness, I have retained three aspects from the evidence presented to me:

> a. First, there is the reckless disregard you demonstrated. In the circumstances, this is no ordinary disregard. When we were speaking of a marked departure, we were speaking of something very specific, what a person would not normally do in the circumstances, taking into account your experience in weapons handling and also taking into account the missions you have taken part in and the training you have received. Your training is quite impressive, as you have trained in a number of areas. From your rank, it would be four years, if I am not mistaken, that you have been warrant officer. So, you are seen as—you are perceived as a leader in your unit, and the fact that you acted in the presence of sub-alternates, all of that compounded together, shows reckless disregard and, in that sense, it is an aggravating factor I must take into account.
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> b. The other aspect is the operational theatre. I am fully aware that ranges—there are ranges in Canada on bases—they are part of daily training, well, I would not say daily, but customary for persons in your profession, which is why you have training, but when you are in an operational theatre, you are more frequently in the presence of live ammunition training simply to be—and you know the reasons as well as I do—it is to make sure that people are comfortable with their weapons and able to use them effectively, considering that their lives may be in danger, and not just their own, but others' lives as well. As a result, we want people to handle their weapons properly and especially not constitute a danger to others, and in the operational theatre we have more of a firing range. So, the fact that it happened over there, where people go and are already in danger, our soldiers' lives are put at even greater risk, in that context it is a factor that I have to consider aggravating, the place where it happened.

c. Last, there is the degree of responsibility that you had at that time. As the highest ranking officer on the firing range, which you were in charge of, it is clear that you should have shown some leadership. I think that it is fairly clear for you; it is something that you know well: you should set an example. And it was found elsewhere in other documents, in the major's testimony; it is clear that this is a factor that the court must consider aggravating in the circumstances.

[13] There is also a series of mitigating factors which the Court must take into account :

a. The first factor is your plea of guilty. In pleading guilty to both counts of negligently performing a duty imposed on you, you have clearly demonstrated your remorse and your sincere intention to remain a solid asset to the Canadian Forces.

b. There is also the fact that you have no criminal record or similar offence on your conduct sheet. You have to understand that when counsel tells me that you have no conduct sheet, a Canadian Forces conduct sheet is an instrument used to record good and bad deeds. So, you might have a conduct sheet for the mentions you may have received, such as in operational theatre or in combat. So, it is not so much the fact that you do not have a conduct sheet as that there is no note on your conduct sheet regarding any similar offences of the same nature.

c. There is the fact that you bore the administrative consequences that resulted from those incidents. Administrative measures are not a sentence in and of themselves. They are something that is under the responsibility of the chain of command, your supervisors, your superior officers, and it is totally different from the sentence that is imposed by a military court. However, the Court must take them into account. First, because it has the effect of denouncing—a denunciatory effect on the actions taken. If I have understood correctly, you were withdrawn early from the mission on account of this particular incident, so people can see that as a denunciation of your conduct, regardless of your responsibility as such. In addition, this is a measure that certainly had a dissuasive effect on the other military members on site over there. A message was communicated that such conduct cannot be tolerated. So, the Court has to take into account those administrative measures that were imposed on you.

d. There is also the fact that you had to face this Court Martial. Without being ostracized, there is no doubt that people are aware of the fact that you were charged and that you had to appear before a Court Martial. And that fact—that plus the fact that many of your peers and other members, probably from your unit, are or were here today, means that this has a dissuasive effect on you, because this is not necessarily an experience that you want to repeat, and it also had a dissuasive effect on the others, as it gave them an idea of what this may be like.

e. Now, there are two other mitigating factors I am taking into account and on which I am placing greater emphasis because, up to a certain point, I agree with the submissions made by counsel. First, there is the fact that it was an isolated incident. And you saw, through my questions, that I tried to explore with the major, to understand during his testimony, from the facts he knew, whether this was something that, while not habitual, could be a recurring behaviour with you, and it is clear that it was an isolated incident. That is to say, it is a behaviour that is entirely unusual and unexpected on your part, which means that this incident is unique in your career. And in that sense, this is a mitigating factor because we can see that you are not in the habit of doing such things in such circumstances.

Next, the other mitigating factor that I consider very important is the fact that there were no tangible and adverse consequences. If I understand the circumstances correctly, you were in charge of that firing range and, to some extent, you relied on your own judgment and maybe, from your personal point of view, the way in which you acted did not involve any danger because of your extensive familiarity with what you were using, be it the banger or the M-72. Probably, for you, it seemed that no one was necessarily in danger. However, according to Canadian Forces standards, which are very restrictive, because these are weapons that can wound and kill, you failed to meet those standards. And no one was placed in real danger; I have no evidence that anyone at all could have been wounded, but there was still a risk. In that sense, even if there was a risk, there was no harm done. And I have to—it is a factor that contributes to determining the sentence, and I believe that it is important. And it is very fortunate that such a thing did not happen because I do not think that you would have wanted to be facing some of your colleagues who had been wounded by one of your actions in the operational theatre. I have seen it personally, and I do not think it is a situation that any military member wants to be in, who, because of his or her mistake, in fraction of a second altered the course of someone's life. I do not think that it is something that interests many people, despite the fact that the profession you are practicing involves certain inherent dangers, and being in an operational theatre increases the risk. You do not want to be a factor in the life of those people, at least not the ones you work with day in and day out. And I have to take into account the fact that no one was wounded. And I hope that you will also understand that that is not something that you want to have happen again. And those are the mitigating factors.

[14] I must also take into account—a little earlier I spoke about certain principles, there is a principle of parity. That means that I have to take into account other decisions that were handed down in similar matters. Among others, I mentioned, *Master Corporal Elliott*[2] and *Private Orton*;[3] I also—there is also a decision I made in 2008 in *Carreau-Lapointe*,[4] in which the circumstances were different but also concerned

[2] *R. v. Elliott,* 2010 CM 3019.
[3] *R. v. Orton,* 2010 CM 3020.
[4] *R. v. Carreau-Lapointe,* 2008 CM 3023.

negligence under section 124, three offences of negligence for which a severe reprimand and a $1,000 fine were imposed. It was not in an operational theatre and did not involve weapons; but it was related to security and supervision and also involved negligence. And in your case, the question of safety is a factor. These are decisions that I must take into account and, as counsel told the Court, there are no Court Martial decisions that can be found that are similar as to the circumstances and the type of charges as such, but these are useful in determining the minimum sentence in the circumstances and I am taking those decisions into account.

[15] There is also the effect of a severe reprimand. A severe reprimand, for military members, certainly, it is—in concrete terms, you do not see the same effect as for a fine or imprisonment, but in the military world, a severe reprimand is intended to denounce the conduct and also indicates that there is a good hope that the person will be able to rehabilitate himself or herself, because a severe reprimand is below everything related to incarceration, destitution from Her Majesty's service or reduction in rank. At this stage, when the Court is considering imposing a severe reprimand, it is a sign that both denunciates the action and underscores the fact that the military member can be quickly rehabilitated within the Canadian Forces.

[16] Last, another thing that is important to retain is the fact that in pleading guilty to and having been found guilty of both offences, you have a criminal record. You will have to apply for a pardon of that criminal record once you have completed your sentence. And I think that this is something that military members have to consider. If you remain a Canadian Forces member, this criminal record will not prevent you from leaving the country—I am not giving you legal advice, here—but, essentially, as part of normal operations with allied countries, it is not a factor that is taken into account. However, from an individual standpoint, you have a criminal record, and that may impose certain restrictions. So, it is also not something to be disregarded in the circumstances.

[17] I have also considered whether this is an appropriate case for a weapons prohibition order, as I am obliged to do under section 147.1 of the *National Defence Act*. In my opinion, such an order is neither desirable nor necessary to protect the safety of the offender or any other person in the circumstances of this case. That is because, as counsel present here emphasized, the circumstances do not weigh in favour of such an order. It was a very particular incident which in no way shows that you have any problem handling weapons such that you would constitute a danger to yourself or others—quite the contrary. I would say that you got away with one that day on July 8, but there is nothing that indicates to me that, if you have a weapon in your hands, it is something that would happen again—quite the contrary.

[18] I do not know where you are in your military career because little evidence was submitted to me in that regard, and this is not meant as a reproach to anyone, but I have little evidence before me about that and I work only with the evidence submitted to me in the Court. However, I know very well that, considering your experience and rank that you will retain all of the lessons that must be taken from such an incident and that you

will be able to do something positive when you act as a leader towards those you supervise. It is a life lesson, and I am sure that you will take from it—everything necessary so that not just you, you benefit from it, but others as well, of that I am sure.

[19] So, at this stage, Warrant Officer Thibault, stand up. The Court therefore sentences you to a severe reprimand and a $2,000 fine that must be paid in consecutive monthly instalments of $200 as of November 1, 2010, and over the subsequent nine months. If you are released from the Canadian Forces for any reason before the fine is paid in full, the then outstanding unpaid amount is due and payable prior to your release.

The proceedings concerning the Standing Court Martial of Warrant Officer Thibault are now concluded.

Counsel:

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