



COURT MARTIAL

Citation: *R. v. Ngoviky*, 2010 CM 3027

Date : 20101214

Docket: 201059

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal F.A. Ngoviky, offender

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

OFFICIAL ENGLISH TRANSLATION

REASONS FOR SENTENCE

(Orally)

[1] Corporal Ngoviky, the Court Martial having accepted and recorded your plea of guilty to the first and second charges, the Court now finds you guilty of both charges. Since the third charge is an alternative to the first charge, the Court directs a stay of proceedings on the third charge.

[2] As the military judge presiding at this Standing Court Martial, it now falls to me 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.

[4] 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.

[5] Imposing a sentence is the most difficult task for a judge. In *Généreux*, the Supreme Court of Canada held that “[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”.¹ 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”.² However, the law does not allow a military court to impose a sentence that would be beyond what is required in the circumstances of the 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.

[6] 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 reprimand and a \$500 fine.

[7] The Court Martial is not bound by that recommendation. However, it is well established in the case law that there must be incontrovertible and compelling reasons for the Court to disregard it.³ 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.

[8] 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.

¹ See *R. v. Généreux*, [1992] 1 S.C.R. 259, at page 293.

² *Ibid.*

³ See *supra*, note 1.

[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 and to the degree of responsibility and previous character of the offender;
- b. a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- c. before considering depriving an offender of liberty, the Court has the duty 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
- d. last, all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[10] 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 deter others in similar situations from engaging in the same prohibited conduct.

[11] In this case, the Court must deal with an offence of disobedience of a lawful command for having failed to wear a helmet when ordered to do so by a sergeant and an offence of having behaved with contempt toward a superior officer by disrespectfully adopting the position of attention.

[12] The Court wishes to point out that disobeying a lawful command of a superior officer is a serious military offence. Obedience of commands is central to the profession of arms and all armed forces. The attitude towards commands received is forged through different situations and through training. As well, obedience of commands is an essential behaviour to adopt in combat and during operations, which is learned on a daily basis.

[13] These are therefore purely disciplinary offences that are very serious in a military context, but the Court will impose what it considers to be the minimum sentence applicable in the circumstances.

[14] It is essential to reiterate that military courts are sensitive to this type of offence. In a military context, such offences have an impact on unit cohesion and morale, since they concern the principles of obedience to and support of lawful authority, which all Canadian Force members must honour. To ensure the success of any mission, an armed

force must be able to count on a crucial element: the respect and responsibility of military members, in all circumstances and at all times.

[15] In arriving at what it considers to be a fair and appropriate sentence, the Court has therefore considered the aggravating and mitigating factors presented by the facts of this case.

[16] The Court finds the following factors to be aggravating:

- a. First, the objective seriousness of the offences. You were found guilty of an offence punishable under section 83 of the *National Defence Act* for having disobeyed a lawful command, for which you are liable to imprisonment for life or to less punishment. You were also found guilty of an offence punishable under section 85 of the *National Defence Act* for having behaved with contempt toward a superior officer, for which you are liable to dismissal with disgrace from Her Majesty's service or to less punishment.
- b. The subjective seriousness of the offence, which consists of two aspects. First, it must be borne in mind that these incidents took place on a range, where the safety of military members is vital. By removing your helmet in the stop butt, when you are required to wear it at all times, you clearly expressed your refusal to obey the command you had received. There was no particular reason allowing you to act in this way. Furthermore, in expressing your disagreement with the way in which staff was managed and in acting in such a manner as to make that clearly known to your superior officer, you failed to show the customary respect demanded from all military members in such circumstances. You have the right to express your disagreement, but you must also give a thought to how you express it.
- c. Your experience and rank should have enabled you to avoid committing such offences. You know very well the kind of respect that you should have for commands you receive and for the authorities who see to their enforcement. For one moment, you decided to forget everything without concern for the consequences for yourself and those around you.

[17] The Court considers the following to be mitigating factors:

- a. Your plea of guilty is clearly a sign that you are remorseful and sincere in your intention to remain a valid asset to Canadian society.
- b. Your age and your career potential as a member of the Canadian community; being 33 years old, you have many years ahead to make a positive contribution to Canadian society in general.

- c. Your lack of a criminal record or conduct sheet referring to similar offences.
- d. Your performance as a member of the Canadian Forces. It is clear that you are a solid and reliable asset and that your personal qualities and dedication have made you an effective contributor to the various tasks and missions of your unit.
- e. 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.
- f. The time elapsed since the incidents. It seems that during this time, no other incident of this type has been noted or reported about you. This also confirms that, more than anything else, it was an instance of unusual behaviour on your part. Furthermore, considering that these offences sit relatively low on the scale of gravity, prompt resolution of such a matter has a greater tendency to have an immediate impact on discipline. I understand that many things have occurred since the incidents and that the relevance of taking disciplinary measures fades quickly with time in this type of case.
- g. Your medical condition related to your diagnosis of post-traumatic stress disorder, which may partly explain your difficulty in controlling your mood on the day of the incidents.

[18] The appropriate penalties for offences of this nature and in such a context usually range from a severe reprimand to a reprimand and a fine, and to only a fine in some cases. The Court must reiterate that a reprimand is a serious penalty in a military context. On the scale of penalties, it is above a fine, regardless of the amount. It reflects the doubt cast on the military member's commitment at the time the offence was committed. It reflects the gravity ascribed to the offence, but also the offender's real hope for rehabilitation

[19] A just and equitable sentence should take into account the seriousness of the offence 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 offence 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 a reprimand and a fine of \$500, considering that this sentence is not contrary to the public interest and would not bring the administration of justice into disrepute.

[20] Corporal Ngoviky, stand up. The Court sentences you to a reprimand and a \$500 fine, payable immediately.

[21] The proceedings relating to the Standing Court Martial of Corporal Ngoviky are now concluded.

Counsel:

Captain E. Carrier, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Captain H. Collins, Directorate of Defence Counsel Services
Lieutenant-Commander P. Desbiens, Directorate of Defence Counsel Services
Defence counsel for Corporal Ngoviky