



COURT MARTIAL

Citation: *R. v. Orton*, 2010 CM 3020

Date: 20100825

Docket: 201033

Standing Court Martial

Canadian Forces Base Shilo
Shilo, Manitoba, Canada

Between:

Her Majesty the Queen

- and -

Private S.V. Orton, Offender

Before: Lieutenant-Colonel L.-V. d'Auteuil

REASONS FOR SENTENCE

(Orally)

[1] Private Orton, having accepted and recorded a plea of guilty in respect of the third charge on the charge sheet, the court now finds you guilty of this charge. Considering that the first and the second charge were withdrawn by the prosecution at the beginning of this trial, then the court has no other charge to deal with.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 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 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 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 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. 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 article 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 detention for a period of 60 days in order to meet justice requirements. 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 in the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently.

It emphasizes 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 military court to impose a sentence that should 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.

[6] 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 Canadian Forces;
- b. denunciation, denounce unlawful conduct;
- c. deter the offender and other persons from committing the same offense;
- d. separate offenders from society where necessary; and
- e. rehabilitate and reform offenders.

¹ [1992] 1 S.C.R. 259

[7] 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 offense.
- 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 offender for similar offenses 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, a court should impose a sentence of imprisonment or detention only as a last resort as it was established by the appellant Courts, the Court Martial Appeal Court and the Supreme Court of Canada.
- e. And lastly, sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offense or the offender.

[8] Previously, I referred to the joint recommendation made by both counsel. I just want to mention that 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.

[9] Here the court is dealing with an offence for having negligently performed a military duty imposed on the offender which was to have failed to take proper precautions against unsafe discharge of his C9 light machine gun. It is a very serious offence. If I understand clearly, on the morning of 24 February 2010, Private Orton was involved in the preparation of a live-range with his unit. In order to be ready, he decided to proceed with the cleaning of his weapon. Unfortunately, he mishandled or didn't proceed correctly and mishandled in many ways his weapon. Probably the worst worse thing that happened that morning is to put on the tray rounds on the C9. It was not obvious—it was unusual to do something like this and it's one of the four improper things made by Private Orton that morning. The other main thing was the fact that he didn't—I wouldn't say really care—but he didn't care or didn't take proper, I would say, proper—he did not—what I would like to say, you pointed your weapon in a bad direction, but you didn't pay attention properly and you were aware of that. While handling the weapon, it fired a burst of rounds and two CF members were injured, Sergeant Ricard and Bombardier Coles. They were seriously injured that morning and they had to be evacuated quickly that morning.

[10] In order to determine sentence, evidence was introduced before this court. I heard the testimonies of Bombardier Coles, Sergeant Ricard, Major Lunney, and finally,

Private Orton. Some documents were introduced, some of them related to the status of the injuries to both victims and some were about the work performance of Private Orton.

[11] 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 laid in accordance with section 124 of the *National Defence Act*. This offence is punishable by dismissal with disgrace from Her Majesty's service or to less punishment.
- b. Secondly, the subjective seriousness of the offence, and for the court, it covers three aspects:
 - i. First, the context of the negligence. First you were well trained on the C9 light machine gun. In fact, if I understand clearly, it was your weapon for a good part of the tour you were on. You were in an operational theatre where life of CF members is endangered by many, many things, so security is an issue, especially for weapons. Also, you have the type of weapon. It's an automatic weapon, meaning by this, as mentioned by the prosecutor, a lot of bullets, a lot of ammunition is shot within a minute. This type of weapon is a bit—all weapons are dangerous, but this type of weapon is a little bit more dangerous because of its nature. When you pull the trigger as you are really aware, I know you are really aware of that, but I have to mention that, I have to let people know that I consider that, it's a little bit more dangerous this kind of weapon. As I mentioned earlier in the summary of the facts, pointing was one of your mistakes and I think this is one thing that all soldiers on basic training learn, unless you're firing at the enemy when you're in friendly lines, you care about where you point your weapon because something may happen. The other thing is the way you decided to clean the weapon. I think probably it was a good thing to have a good weapon in good shape that morning, but putting rounds on the tray was the mistake and I'm pretty sure you will never do this again on any weapon; you won't put any rounds in the chamber like you did. You put in "ready" position, you removed and put back the barrel and the parts would put forward, if I understand clearly, without control so there was a burst. I think although this context there is a lot of little things that happened and you never realized while you were doing this that what would be the end result. The context of the negligence reveals also that there is a certain degree of care. In operations, I think, people will expect from others a higher degree of care because especially when you carry weapons. And in this situation, the highest degree of care; when soldiers are on the ranges, security is the first con-

cern, I don't think it's different no matter what is the fact that you're in an operational theatre and a reasonable person should have cared, probably, and you know that, and your behaviour was more than a marked departure in this case.

ii. The second aggravating factor I have to consider is the consequences on victims and the consequences of your negligence on the victims. It was unfortunate the lives of two people have changed. And I know, you didn't—it was not on purpose. It's further to a negligence. They were injured: first, physically, as you heard this morning, one is recovering well but not totally for now. I think Sergeant Ricard was injured in a bad way, but it's not just the physical aspect of it, it's the mental aspect of it. I think you heard both prosecutors, both counsel mentioning the fact that there's uncertainties left in their life. They don't know about their career, they have to adapt to a new life so it's—I know that you know—it's not something that they asked for and it's clearly, when I will talk about mitigating factors, I consider the fact that you deeply regret that, but the reality is that they have to deal every day with this, and these consequences, I have to consider that as an aggravating factor.

iii. The third thing, and I take out of the context of the negligence, is the familiarity with your weapon. It's not just the fact that you're an infantryman, but it is also the fact that you were specifically tasked to carry this weapon and to get familiar with. It was your tool as a soldier during the tour, you got trained and you used it often up to that time. So you were familiar and I have to consider this as an aggravating factor too.

[12] Now, it's one side of the thing. The other side of the thing is the mitigating factors:

a. 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 Forces and it also discloses the fact that you are taking full responsibility for what you did. The reality is that you are taking full responsibility from the beginning, from the time it happened and it is clear for the court through your testimony, through your actions that you deeply regret that and it is clear for me, and be sure that I understand that you never wanted something like this. It is clear for the court that if you could have done something different to avoid what happened, you would have done it without hesitation, and I'm sure of that.

b. As a mitigating factor, I also consider your work performance. I think you have been described in many ways as a good soldier with a good future and you haven't—if I understand correctly, your performance, despite what hap-

pened, was very good. And I think you still want to perform in the Canadian Forces, perform in your trade and I think it is something that goes on the positive side of the things.

c. You also had to face this court martial. I'm sure it has had already some deterring effect on you but also on others.

d. The other thing is the confidence and support from your chain of command. And you heard me asking a specific question on this to Major Lunney. It is because I wanted to understand why after such incident they are still confident in your capacity to use a weapon without hurting anybody around you. And I think they made—what I got from that is they gave a thought to what was the best interest; your best interest, the best interest of the unit and they gave a thought to the fact that you had to act in a safely manner and they decided to re-install you in your position with a different weapon, but it's still a weapon. So they had a lot of confidence in you. And I think it's a message, for them, it's something that it was just a matter of coincidence, it was unusual for you to be involved in something like this so it's a lot of confidence and it sends a message to the court that you're still a valuable asset in the Canadian Forces. So it's another good thing to consider as a mitigating factor.

e. Probably one of the things that you will have to deal with is to learn to deal with this incident for the rest of your life. As you mentioned in your testimony, you're thinking about this every day, every single day of your life since it happened and you will have to deal with this. So I think it is a mitigating factor in the circumstances of this case.

[13] So the court has concluded that sentencing should focus mainly on the objective of general deterrence, specific deterrence and denunciation. Concerning the fact for this court to impose a sentence of incarceration to Private Orton, it has been well established by the Supreme Court of Canada, this is in *Gladue*², that incarceration should be used as a sanction of last resort. The Supreme Court of Canada specified that incarceration under the form of imprisonment is adequate only when any other sanction or combination of sanctions is not appropriate for the offence and the offender. This court is of the opinion that those principles are relevant in a military justice context taking into account the main differences between the regimes for punishment imposed to a civilian tribunal sitting in criminal matters and the one set-up in the *National Defence Act* for service tribunal. It is important to say that this approach was confirmed by the Court Martial Appeal Court in *R. v. Baptista*³ and also *Castillio*⁴ where it was said, that incarceration should be imposed as a last resort.

[14] Here in this case, I reviewed the scale of punishment, as I showed you earlier in my explanations, and considering the nature of the offence, the circumstances it was

² [1999] 1 S.C.R. 688, at paragraphs 38 and 40.

³ 2006 CMAC 1, at paragraphs 5 and 6.

⁴ 2003 CMAC-468

committed, the applicable sentencing principles including the general deterrence, the aggravating and mitigating factors mentioned above, 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.

[15] Now, what would be the appropriate type of incarceration in the circumstances of this case? The military justice system does have, as a tool, the punishment of detention which is sought to rehabilitate service detainees by re-instilling in them 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 from other members of society. Detention may have an important deterrent effect without stigmatizing a military convict to the same degrees as military members sentenced to imprisonment as it appears from the notes added to article 104.04 and 104.09 of the QR&O. I should mention that it is your very first offence you're convicted for, so as a mitigating factor, the court has to consider also the fact that you don't have any conduct sheet. So I consider that detention would be the most appropriate type of incarceration in the circumstances.

[16] This matter discloses clearly that it called for some basic military principles and values to be re-instilled in Private Orton, especially about responsibility in handling weapons. Detention also will serve as a general deterrent effect for those who would be tempted to take such approach as a proper conduct in the Canadian Forces.

[17] Concerning the length, I would say that 60 days look like it is the appropriate period of time in the circumstances. It would meet the required sentencing principles and objectives as well as maintaining discipline and confidence in the administration of military justice.

[18] I understand that 60 days of detention will never replace what happened to the victims here and the purpose is not to bring us back where it was before like nothing happened. I would encourage you to take this time to see how you will deal with this matter. You know what is the military, you know what you did, and I'm pretty sure you're confident when you will give some thought to this that you can stay in the military in the Canadian Forces. From that, you have learned a lot and you may teach a lot to others about what happened. And maybe, you may avoid the same incident at some point in your life as a military member.

[19] For those who are victims, I hope that things will go well. I appreciate the fact that you came here, that you told exactly what is your situation, it is a very difficult one, and I hope that the Canadian Forces will continue to support you in order to help you to go through all this. There is, unfortunately, nothing else the court can do. We have to deal what is life as it is, but I hope that you will see, even though there is nothing positive at the beginning of something like this, you will see sometimes life changes but for good. You don't expect something like this to happen in your life, but I hope that you will be able to go through without any problem.

[20] The court provided an opportunity for counsel to comment if it was desirable in the interest of the safety of the offender, the victims, or any other person to make an order prohibiting the offender from possessing any firearms despite that a firearm was involved in the commission of the offence, but no violence at all was used and it was a specific set of circumstances that brought us in a situation like this. And considering that you were employed since then without any restrictions on any weapon, I do not see the necessity to issue an order of that nature. So it is the court decision that no such order is desirable.

[21] Private Orton, please stand up. Therefore the court sentences you to detention for a period of 60 days. The court accepted the joint submission made by counsel considering that is not contrary to the public interest and will not bring the administration of justice into disrepute.

[22] Now, the sentence was passed at 16:35 on 25 August 2010.

Counsel:

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