

Citation: *R. v. Ex-Private K.A.W. Fox*, 2004 CM 35

Docket: S200435

**STANDING COURT MARTIAL
CANADA
MANITOBA
WINNIPEG**

Date: 25 August 2004

PRESIDING: LIEUTENANT-COLONEL M. DUTIL, M.J.

HER MAJESTY THE QUEEN

v.

EX-PRIVATE K.A.W. FOX

(Accused)

SENTENCE

(Rendered Orally)

[1] Ex-Private Fox, please stand up. Having accepted and recorded a plea of guilty in respect of the lesser and included offence of assault causing bodily harm with regard to the first charge, this court finds you guilty of that lesser and included offence of assault causing bodily harm. You may be seated.

[2] This is a case where the prosecutor in consult with the defence have made a joint submission on sentence. They have recommended that this court sentence you to imprisonment for a period of 45 days and that the court suspend the carrying into effect of the said punishment. As stated earlier, the court had serious reservations as to the propriety of that recommendation. Consequently, I asked counsel to provide the court with detailed explanations as to the rationale behind it. Counsel for the prosecution, Lieutenant-Colonel Young, is a senior Crown counsel in the Province of Ontario. In response to a question by the court, he confirmed that should this case have been dealt with in a court of competent jurisdiction sitting a criminal matters, his recommendation would have been the same because it is not in the interest of justice that this offender serve any custodial sentence in the circumstances of this case and in the particular circumstances of this offender although a custodial sentence is warranted.

[3] This is distinguishable from cases where the offender is sentenced to a conditional sentence which still constitutes a custodial sentence.

[4] The court understands that counsel also jointly recommend that this court issue a DNA Order pursuant to section 196(14) of the National Defence Act as this is an offence punishable under section 130 of the National Defence Act contrary to paragraph 267(b) of the Criminal Code which is a primary designated offence. Finally, counsel suggests that should this court consider the issuance of a prohibition order pursuant to section 147.1 of the National Defence Act; that is, an order prohibiting the possession of weapons, that the said order should not go beyond a period of five years. Although this court is not bound by this joint recommendation, it is generally accepted that a joint submission should be departed from only where to accept it would be contrary to public interest and would bring the administration of justice into disrepute.

[5] Counsel present in this case are experienced and knowledgeable. Their recommendation cannot be taken lightly.

[6] The court has considered the joint submission in light of the relevant facts set out in the statement of circumstances and their significance and I have also considered the joint submission in light of the relevant sentencing in principles. I must say that I agree with the prosecution when they expressed the view that the protection of the public must be ensured by a sentence that would emphasize specific deterrence and general deterrence. This case is a good example of escalating violence, as a consequence, at least in part, of poor indulgence of alcohol by young adults. I would also add that this sentence must, nevertheless, reflect the sentencing principles of denunciation and proportionality with regard to the responsibility of the offender in this incident. As stated by the defence, not only ex-Private Fox was attacked in his own home but he had been the victim of assault earlier that night by Private Thomas. Prosecution indicated that ex-Private Fox's reactions to Private Thomas' last assault on him was attributable, at least in part, by his consumption of alcohol, the blows he had received just prior to his attack on Private Thomas and the blows he suffered earlier that night to the extent that Private Fox was suffering from a minor, albeit minor concussion and according to the prosecution, ex-Private Fox's thoughts or thought processes, at the time, was impaired.

[7] The court finds that the facts of this case are objectively at the higher end of the spectrum in matters of assault causing bodily harm, both in terms of the seriousness of the assault and the consequences of that assault. Stabbing someone with a bayonet in the circumstances described in the summary of circumstances that was provided to the court and the injuries suffered by the victim could have warranted either even more serious charges. The prosecution, nevertheless, accepted a plea to the less serious and included offence of assault causing bodily harm.

[8] The court considers that this plea of guilty by ex-Private Fox is a genuine sign of remorse. He co-operated with police authorities during their investigation in this matter, as indicated by his counsel, could have been disposed of much sooner. As stated

by the Supreme Court of Canada in R. v. Gladue (1999) 1, Supreme Court Reports, page 688, incarceration should be the punishment of last resort. The court believes that an assault of this nature would normally dictate a punishment of imprisonment. The circumstances in which the assault took place are definitely unique given the repeated aggressions of Private Thomas towards ex-Private Fox.

[9] Prosecution emphasized that unlike normal cases of assault causing bodily harm, denunciation is not required. I've already indicated that the court had a different view on that. Counsel for the prosecution believes that it is not in the public interest or that of the Canadian Forces that ex-Private Fox serve a custodial sentence.

[10] Your service in the Canadian Forces, ex-Private Fox, has been very brief. In the short period of time you served with your country with honour and you continue to pay a severe price for having done so. Veterans Affairs recognized that you suffer from PTSD as a result of your service in Afghanistan where you were involved with other comrades in the digging of compost corpses. You are still suffering to this date and no one knows when and if you will fully recover from that difficult experience. I sincerely hope so.

[11] You have also been released from the Canadian Forces and you are now living with your partner and her mother on the Blood Nation Reserve in southern Alberta. The court understands that you are also a member of that First Nation. And the court is sensitive to the fact that you live in the respect of your nation's traditions. You also testified that your partner and yourself will become new parents before the end of the year and that you have not consumed alcohol since July 2003. This is also significant. The evidence in mitigation indicates that you will soon start employment in the oil industry and that you plan to return to school when your family obligations will allow you to do so.

[12] In a nutshell, the court is satisfied that this incident is out of character and extremely regrettable. It is an isolated incident and that after you were pushed to the limit. The court believes that you are a responsible young man that is blessed with the potential to become a valuable asset, not only to your community, but also to the Canadian society as a whole. The court believes that sending you to a service prison or to any prison according to the prosecution would not serve the interest of justice. It is therefore of the utmost importance that this court emphasizes that the circumstances of this case are unique, both from an objective and subjective aspect. Would it be otherwise, this court would not, and I repeat, this court would not accept that joint recommendation that the court considers to be at the very low threshold of what is an appropriate punishment.

[13] However, you must understand, that the offence to which you have pleaded guilty is a very significant one that had serious consequences on Private

Thomas and that could have been fatal to a former member of the Canadian Forces. In consequence, the court will accept the joint submission made by counsel to sentence you to the punishment of imprisonment for a period of 45 days, and to suspend the carrying into effect of the punishment because the court believes, after close scrutiny, that it will not be contrary to public interest and that it would not bring the administration of justice into disrepute.

[14] Please stand up. Therefore the court sentences you to imprisonment for a period of 45 days and the court suspends the carrying into effect of the punishment. The court also makes an order pursuant to section 147.1 of the National Defence Act, in addition to the punishment imposed, that prohibits you to possess any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance for the period beginning on the day this order is made, that is 25th August 2004 and ending 25th August 2009.

[15] Finally, the court makes an order pursuant to section 196.14 of the National Defence Act, authorizing the taking from your person, for the purpose of forensic DNA analysis, of any number of samples of bodily substances, that is reasonably and required for that purpose. You may be seated.

[16] The proceedings of this court martial in respect of ex-Private Fox are terminated.

LIEUTENANT-COLONEL M. DUTIL, M.J.

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