Citation: *R. v. Master Corporal D.W. Deans*, 2004cm1008

Docket: S200430

STANDING COURT MARTIAL
GEILENKIRCHEN
GERMANY
TERRY FOX HALLE, BUILDING B11, SELFKANT KASERNE

Date: 25 May 2004

PRESIDING: COLONEL K.S. CARTER, M.J.

HER MAJESTY THE QUEEN
v.
MASTER CORPORAL D.W. DEANS
(Accused)

SENTENCE
(Rendered Orally)

_1_ Master Corporal Deans, the court, having accepted and recorded your plea of guilty to the first and only charge on the charge sheet, the court now finds you guilty of that charge.

_2_ At this point in time the court is going to explain to you how it has determined the sentence it is going to impose upon you. The court will allow you to break off and sit with your defence counsel now, and when the time comes that the court imposes the sentence it will have you stand for the imposition of the sentence. So you may now break off and sit with your defence counsel.

_3_ This is a case involving activities that took place on the 20th of April, 2003, an investigation apparently followed. By the 23rd of April, 2003, according to Exhibit 10, sufficient analysis, the details of which are outlined in Exhibit 3, had been completed, which permitted a member of the military police to conclude that he or she had reason to believe that Master Corporal Deans' blood alcohol level on the 20th of April, 2003, exceeded 80 milligrams of alcohol in 100 millilitres of blood.

Master Corporal Deans' CFE driving licence was suspended on that basis from the 23rd of April, 2003, to the 21st of July, 2003, a period of 90 days. Charges were laid in this matter, apparently, sometime between the 20th of April, 2003, and the 6th of February, 2004. On the 6th of February, 2004, a charge sheet was signed. A court martial was convened on the 4th of March, 2004, and this court martial commenced today, that is the 25th of May, 2004.

_4_ The court, in determining the appropriate sentence in this case, has considered a number of things, including: the general principles of sentencing that are found in cases, both civilian and military, which deal with offences or circumstances of a similar or apparently similar nature; the nature of the offence to which you have pled guilty; your previous character; the mitigating and aggravating factors disclosed; the Statement of Particulars; the documentary evidence introduced by counsel; and the submissions of both counsel. No witnesses were called on sentencing by either the prosecution or the defence.

_5_ It is, perhaps, somewhat difficult to understand, but occasionally the less material the court has the more carefully it must consider the circumstances. The court believes it's important to set out the process of arriving at its decision on this sentence.

_6_ The fundamental purpose of sentencing is to enhance the protection of society. The Supreme Court of Canada has stated that in the case of *R. v. Lyons* [1987] 2 S.C.R.,309 at page 329: the protection of society is achieved if the imposition of legal sanctions serves to deter both the convicted offender from re offending and those who have yet to offend from doing so at all. Just sentences promote respect for the law, which enhances the protection of society, which includes the Canadian Forces and individual members of that institution. The protection that is sought is protection from unlawful conduct and its consequences.

_7_ The general principles that are used to achieve this include the principle of deterrence, specific deterrence, which is to deter the individual, and general deterrence which is to deter others in similar circumstances who might be considering similar actions; the principle of denunciation, which is an expression of society's rejection of the conduct;

and thirdly, the principle of reformation and rehabilitation, which may occur within military society or within Canadian society, generally. In addition, another underlying principle is that of proportionality. A sentence must be proportionate to the offence and the degree of responsibility of the offender. This requires a sentence that is appropriate not only to the nature of the offence, but also to the moral blameworthiness; that is, the character of the offender, the circumstances that it was committed in, and the consequences of its commission.

_8_ A judge must also take into account the mitigating factors which include matters such as a guilty plea, restitution, and a first offence, and aggravating factors which include matters such as physical and psychological harm caused by misconduct and the amount of any depravation. And finally, a judge must not impose a sentence that is disproportionate given sentences imposed on similar offenders in similar circumstances. In saying that, the court would state it is sometimes difficult to determine what constitutes similar circumstances, and it always must keep in mind that this is an individualized process.

_9_ The court must determine which principle or combination of principles, when applied, will enhance the protection of the public, reestablish respect for the law, and in the case of courts martial, as a consequence of this, achieve the ultimate aim which is to reestablish discipline. The court is also required, in imposing a sentence, to follow directions set out in QR&O 112.48, which obliges it, in determining sentence, to take into account any indirect consequence of the finding or of the sentence and impose a sentence commensurate with the gravity of the offence and the previous character of the offender. Both civilian and military law require that the offence be punished by the minimum punishment necessary to achieve these aims.

_10_ The court has also considered the guidance, and it is guidance and not binding upon the court, of the purposes of sentencing set out in section 718 of the *Criminal Code of Canada,* which are particularly useful when dealing with a section 130 *National Defence Act* offence which incorporates a *Criminal Code* offence. Those purposes are to denounce unlawful conduct, to deter the offender and other persons from committing offences, to separate the offender from society when necessary, to assist

in rehabilitating offenders, to provide reparation for harm done to victims or to the community, and to promote a sense of responsibility in offenders and an acknowledgement of the harm done to the victims and community. These principles are very similar to ones that are found in the *National Defence Act* and Queen's Regulations and Orders.

_11_ The court is also cognizant of the words of the Supreme Court of Canada in 1998 *R. v. Gladue (1998)*, 133 C.C.C. (3d) 385, where at page 402 it states, imprisonment should be used as a sanction of last resort.

_12_ The court also takes into account that the ultimate aim of sentencing is the restoration of discipline in the offender and in military society. Discipline is that quality that every CF member must have and which allows him or her to put the interests of the Canadian Forces and the interests of Canada before their personal interests. This is necessary because Canadian Forces members must willingly and promptly obey lawful orders, and those lawful orders may have very devastating personal consequences, such as injury or death. Discipline also requires trust, both up and down, to superiors and subordinates. I've described discipline as a quality, because ultimately, although it is something that is developed and encouraged by the Canadian Forces, it is an internal quality, and it is one of the fundamental prerequisites to operational efficiency in a military force.

_13_ It may be difficult sometimes to understand what the connection is between discipline and an offence such as driving while the level of alcohol in ones' blood exceeds 80 milligrams of alcohol in 100 millilitres of blood. Like all section 130 *National Defence Act* offences which are also *Criminal Code* offences, this offence can also be committed by civilians. What is its connection to discipline? That connection is twofold: firstly, a very general one, which is members of the military must be committed to observe the laws of Canada; and secondly, and in relation to this particular offence, the nature of the offence shows a disregard for the safety of other members of society. And the safety of Canadians is one of the *raison d'êtres* of the Canadian Forces.

_14_ So those, then, are the general considerations that the court must take into account in determining what an appropriate sentence is in

this case; that is, what will properly reflect the gravity of the offence, protect the public, reestablish respect for law and discipline, and take into account not only that, but the circumstances of the commission of the offence, your previous character, your current situation, and what is the minimum that is necessary to restore discipline.

_15_ A review of the evidence provided about the offence to which you have pled guilty discloses it was committed on the 20th of April, 2003, at approximately 11:30 in the evening. You failed to yield at an intersection and collided with a vehicle driven by a US service member. No injuries were incurred, but the other vehicle was declared a total loss by the insurance company. The German police, who were called to the accident, administered a breathalyser to you and the other driver which led them, in your case, to take you to the Heinsberg police station to obtain a blood sample. The blood sample was obtained a little over an hour after the accident, and this subsequent analysis put your blood alcohol level, at that time, at 186 milligrams of alcohol in 100 millilitres of blood, although you did not display any signs of impairment. The German authorities blood analysis procedure established that the concentration of alcohol in your blood at the time you were operating your vehicle was at an undetermined level in excess of 80 milligrams of alcohol in 100 millilitres of blood.

_16_ A review of the evidence presented about you, your previous character, and current circumstances, which comes from Exhibits 4, 5, 6, and 7, shows that you are currently 37 years old, you joined the Canadian Forces in 1986, having completed one year of high school; you are a qualified signals operator who has served with both the Army and the Air Force during your more than 18 years of service; you were appointed a master corporal in May 1999; you have had four overseas deployments, most recently serving here in Geilenkirchen as a communications operator since February 2001, and your current tour expiry date is the 10th of June, 2005; you are divorced; your current salary is approximately $4100 a month gross; and your allowances total an additional, approximately, $1500 a month.

_17_ Your conduct sheet has three previous entries, two absence without leave charges from April and May 1991, for short periods of time; 30 minutes and an hour and forty-five minutes respectively. The second

offence, which occurred some 14 days after the summary trial on the first offence, resulted in a sentence of 21 days' detention. The third entry was a conviction on the 4th of April, 1997, by the Provincial Court in Pembroke, for a section 253(b) *Criminal Code of Canada* offence; that is, the same offence to which you have pled guilty here today. The date of the commission of the offence is not recorded on the conduct sheet. You were sentenced to a fine of $600 and a one year driving prohibition order which expired in April 1998.

_18_ The evidence before the court also discloses, that in addition to a 90-day driving licence suspension, which flows not from conviction, but from administrative action under the Deputy Chief of Defence Staff European Order 09 relating to the Canadian Forces in Europe Licencing and Registration System, which is set out in Exhibits 8 through 11, you also face a two year driving licence suspension as a result of a second conviction for a section 253 *Criminal Code of Canada* offence. Notification of this suspension is passed on to the relevant provincial authorities if you depart from Germany on a posting or release within the term of the suspension. It is not clear, from the material that's provided to the court, what happens if you are sent back to Canada on a course or you return on leave. The period of suspension can be varied by the national military authority, the Commanding Officer of CFSU Europe, and the Commanding Officer, at their discretion. When I say varied, this does not mean it can be increased, but it can be shortened or it can be authorized to be served or dealt with intermittently.

_19_ The prosecution, here, has submitted that an appropriate sentence in this matter is a fine of 1500 to 2500 dollars. The context, he submitted, was that you are still posted in Germany today, and that at the time of the incident you were not on duty. The prosecution listed the applicable aggravating factors as: firstly, the status of being a service member, he described it as a sort of official guest in the country in which the offence was committed; secondly, that the accident that you caused while driving was connected to the operation of a vehicle while you had more than 80 milligrams of alcohol in 100 millilitres of blood; thirdly, that this was a second offence.

_20_ The mitigating factors that the prosecution argued, were that: first, you had pleaded guilty; secondly, that a two year administrative suspension would result from this conviction; thirdly, that a 90-day administrative driving licence suspension had already been imposed; fourthly, that your previous conviction was seven years ago, which, in elaborating in response to a question by the court, the prosecution meant --explained--meant that the court could appropriately consider this a first offence for the purpose of minimum sentence issues; and finally, that your guilty plea avoided a lengthy trial. The prosecution submitted a number of extracts from courts martial transcript, and I will deal with them in a moment.

_21_ The defence submitted that the court should treat this matter as a first offence due to the lapse of time between offences, and also that the 2000 court martial of *Master Corporal Mantha* was good precedent for this approach. He also submitted that the absence of a notice of intent to treat this as a second conviction, together with the prosecutor's submission indicating that this was not being considered as a second offence for the purposes of a minimum sentence, was something that should lead the court to conclude that the minimum punishments set out in section 255 of the *Criminal Code of Canada* should not be seen as relevant. Both counsel later clarified, that in their view, the notice provisions of the *Criminal Code* did not apply directly to courts martial.

_22_ The defence characterized the aggravating factors as a minor accident with--where no injuries were incurred. He listed the mitigating factors as: first, your substantial equity; that is, your good service in the Canadian Forces; secondly, the fact that you entered a guilty plea at the earliest opportunity, which he clarified as this morning at the beginning of trial; thirdly, the more than one year in bringing this matter to trial; and finally, the two administrative driving suspensions that relate to this matter. In addition, in placing the offence in context, he submitted, that the only evidence as to the level of alcohol in your blood, was that it was over 80 milligrams of alcohol in 100 millilitres of blood while you were driving. There was no evidence of any higher reading.

_23_ The cases presented to the court for its consideration are all courts martial, and they range in date from 1989 to 2000. The court has reviewed them all and would summarize their salient points, and it does so accepting that counsel may have introduced them for slightly different reasons, but the court has reviewed them.

_24_ In the case of *Corporal MaGee,* which is a 1989 court martial, there was a trial, this was a first offence, there was a serious accident involved, there were also a number a witnesses called in mitigation, and the sentence was a $500 fine.

_25_ In the case of *Corporal Robichaud,* a 1999--1990 court martial, this was a guilty plea to a section 253(b) *Criminal Code* offence under section 130; that is, the same offence to which you have pled guilty. There was no accident. There were a number of mitigation witnesses who were heard. This was a second offence; that is, a similar offence had occurred in 1990--sorry 1983; that is, seven years earlier, and a $3,500 fine was imposed.

_26_ The *Master Corporal Vachon* case from 1991. There was a trial. There was an accident. For a number of reasons it was treated, very clearly, as a first offence, and the sentence imposed was a $1500 fine.

_27_ In the case of *Private Drapeau,* 1992, and in some cases I have translated both the rank and some of the extracts that I will refer to, but, in the case of *Private Drapeau* this was a guilty plea. Again, a section 130 offence, and a conviction under section 253(b) of the *Criminal Code.* There was no accident. There were a number of mitigation witnesses. It was a second offence. And the punishment was a fine of $2,500.

_28_ There are two extracts that I will refer to from the *Drapeau* case and they are found at pages 55 and 56. And the first one is from page 55, and it begins around line 25, and as this is a French transcript. I will translate it so that it's clear what it is that--what--that I take from this. What it says there is:

_29_ "In addition, this is your second conviction for the same offence. The normal punishment for a second offence is, as is prescribed

in section 255 of the *Criminal Code,* incarceration. But the court is in agreement with the suggestion of the prosecutor that I am not bound by the prescriptions of section 255 of the *Criminal Code.* But, as my colleague, Military Judge Ménard, in the case of *Corporal Gélanas*, a decision of a court martial--a Standing Court Martial not yet reported, but given on the 1st of December, 1989, here at Lahr, this court is of the view that it is only for very particular or exceptional circumstances that section 255 of the *Criminal Code* should not be followed."

_30_ Now, there is also explanation in this as to why the court found the circumstances in that case exceptional, and this is at the bottom of page 55 and the top of page 66. And, in essence, what happened was, in this case, Private Drapeau had been drinking one evening, drinking quite heavily, but had taken precautions and had used a designated driver and hadn't driven. Nevertheless, the next morning he went to work, was seen by one of his supervisors and seemed normal, except for some red eyes. But less than 30 minutes later he was arrested by police because he was driving and his blood alcohol level was still in excess of 80 milligrams of alcohol in 100 millilitres of blood. So the exceptional circumstances that the court found in that case was that he took, really, a number of precautions to avoid driving while his blood alcohol level was in excess of 80 milligrams of alcohol in 100 millilitres of blood.

_31_ The case of *Corporal Ireland* is a 1998 court martial. This was a guilty plea, again to a section 253 (b) *Criminal Code* offence punishable under section 130. It was a first offence. It was a situation where there was no accident. There were a number of mitigation witnesses who established, to the court's satisfaction, that there was no drinking problem, and the fine was a fine of $750. Now, at that time, in 1998, the minimum fine for a first offence was $300, so it was certainly much higher than the minimum. And in that regard I would refer to a statement on page 35 of the transcript provided, and there the court says:

> Had there been an accident however minor, had evidence shown that the life and safety of individuals, other than yourself, had been at risk that night, the court would have considered a more severe sentence than the one it is about to pronounce, including perhaps a short period of incarceration....

_32_ Now, the case of *Master Corporal Mantha, a*gain, this is a case, a court martial case, from 2000. It is a guilty plea. There was, in that case, a very high level of intoxication. This was a second offence, but the first offence had occurred in 1987, thirteen years previously. There was a joint submission between the prosecution and the defence. Here, I would indicate that I am reading from the submission of the prosecutor, which was accepted, subsequently, by the judge, and from page 16. And there it says:

> ... the police reports indicated that there was absolutely no erroneous driving, no hazardous driving, no accidents, there were simply no signs of any alcohol abuse other than the routine check stop. So we have [here] a routine check stop that indicates the individual was tested at over .80. So there were no consequences of the driving, nor was there any danger at the time.

_33_ And I would also refer to the finding of the judge, at page 23. And it says, at the beginning--top of the page, the military judge says:

> There was a time in the Canadian Forces where, as a common practice, all second offenders went to jail for 14 days. However, few courts martial now deal with drinking and driving offences. Were it not for the comments of the prosecution, the court would not hesitate to sentence you to jail as the *Criminal Code of Canada* provides for second offenders.

_34_ So let me summarize what the court reads from these cases, and what it also believes is reflective of the general approach to sentencing at courts martial for offences contrary to section 253(a) and (b) of the *Criminal Code of Canada* as punishable under section 130.

_35_ A court martial, because of the sentencing provisions of section 130(2)(b) of the *NDA,* is not necessarily bound by the minimum sentences set out in section 255. Indeed, it seems evident that civilian courts, due to the notice requirements imposed upon the prosecution, may not infrequently be in a similar position to a court martial where a previous conviction for the same offence is a significant consideration in sentencing rather than the trigger which requires the imposition of a

minimum sentence. Courts martial have traditionally taken the approach that the minimum sentence for driving offences is a guide that should be departed from only if good reason is provided. An offence may not be treated as a second offence if there is a significant gap between the previous section 253(a) or (b) *Criminal Code* offence and the current offence. Finally, it is clear that actual adverse consequences connected to driving while impaired or while the blood alcohol level is in excess of 80 milligrams of alcohol in 100 millilitres of blood usually leads or is stated to lead to a short period of incarceration.

_36_ One matter that is not clear, but may well have relevance given the age of a number of these cases, is changes to the law that have occurred since 1998. And this is not necessarily to the *Criminal Code,* but to the *National Defence Act* and the sentencing provisions of the *National Defence Act*. Prior to 1999, a service member sentenced to imprisonment was automatically reduced in rank, and that rank was not reinstated when they were released from imprisonment. For example, a sergeant who was sentenced, in 1997, to 15 days' imprisonment, on return, if we assume it was in Canadian Forces Europe, would remain a private with the consequent adverse impact on salary and employability. So at that time a significant direct consequence existed for corporals to chief warrant officers which does not exist today.

_37_ What punishment is the minimum required to protect the public and restore discipline in this case? The court has considered the principles it set out earlier. It believes that in an offence of this nature, that general deterrence is the most important. Anyone who drinks and drives is a danger to all other road users; that is, not only people in vehicles, but pedestrians as well. In Geilenkirchen, that includes not only Canadian Forces members, but service members of other nations and the local population. The court also considers, here, because this is a second offence of the same nature, that specific deterrence is required.

_38_ There is no evidence before the court that there has been any change to habits and lifestyle in the past year that would make specific deterrence unnecessary. Rehabilitation and reformation are important, but again, there is nothing before the court of anything specific that it can do, and so the court has taken this into account in determining that

it should not put you in a position where you cannot rehabilitate yourself if you wish.

_39_ I've already spoken of proportionality, and that is important here in light of the parliamentary intent set out in section 255 of the *Criminal Code of Canada;* that is, that this offence is serious enough to warrant a minimum punishment, and also what the court accepts is the correct approach to be followed by courts martial, which is to deviate from that only for a reason. As the court has indicated, it is not bound to a minimum punishment, but it takes the approach that it must look at why this situation warrants being dealt with differently. In doing so its first consideration is this is not a situation on the facts where the danger is any greater or lesser to road users because you are a member of the Canadian Forces. So in regard to an often referred to case called *R. v. Généreux*, there is no reason, that the court can see, that the sentence should be any more serious for a service member than it should be for anyone else.

_40_ The court accepts that it might be considered, because this occurred in Germany, that there are--there is a further dimension that makes certain aspects more serious, something that flows, perhaps, from operations or international relations. But in the courts view, this is not something which the court can take judicial notice of, and no evidence has been put before it on this matter. So the court is of the view that there is no higher punishment required because of the location of the offence. There is also no evidence before the court that there is any particular degree of prevalence to this offence, so that is one of the contextual factors that the court has taken into account.

_41_ In terms of context, which is really neither mitigating nor aggravating, but simply relevant, the court has accepted that there is no evidence that anything other than simply more than 80 milligrams of alcohol in 100 millilitres of blood has been established for the time frame that you operated the motor vehicle. Although you do not face the same judicial driving suspension as those convicted in civilian court, there is an administrative consequence. Here, the court considers that the consequence flowing from conviction is something that it should consider, but not the 90-day suspension, which, on its reading of the information

that it has received, flows directly from actions of the military police, regardless of whether a matter proceeds to trial.

_42_ The court has accepted that the two absence without leave offences on your conduct sheet, which are now 13 years old, should not be taken into account. Firstly, because the court does not see them as being related in any way, and even if they had been related, the court would accept that that was a sufficient gap that they should not be taken into account.

_43_ So what has the court taken into account? In terms of mitigating factors: firstly, your guilty plea. And the court considers that a mitigating factor because it is an acceptance of responsibility, not because it is any action that results in any saving of time and money. The Code of Service Discipline exists for a reason, as do courts martial, and that reason is discipline. A guilty plea does not result in a discount because the Canadian Forces or the Government of Canada is saved time and money. The mitigation comes from your recognition and acceptance that you committed an offence and that you are willing to do what is necessary to restore discipline by accepting a punishment; the second mitigating factor is that you've been a member of the Canadian Forces for 18 years. The court would say that that's really all it can conclude because there is no particular evidence of the details of service other than the documents that have been provided; the court also has taken into account the time this matter has been outstanding; that is, the time it has taken to come to court. It is more than 13 months from the incident. Time can be an even more important factor if it is demonstrated that it goes to rehabilitation. Here, what is clear, on the information before the court, is simply that there have been no convictions or other misconduct in the past 13 months.

_44_ In terms of aggravating factors, the first aggravating factor is that there was an accident. There was an accident that you were responsible for, which occurred while you were operating your motor vehicle with more than 80 milligrams of alcohol in 100 millilitres of blood. There was damage, though there were no injuries. What that demonstrates to the court is that there was actual danger, and that is an aggravating factor. The other aggravating factor is this is a second offence. The court is not prepared to accept that there is such a gap that it will treat this as a first offence. You were sentenced in 1997 to a $600 fine, which was

more than the minimum sentence for a first offence at that time. From April 1997 to April 1998, while posted to Petawawa, you could not drive because you were subject to a judicial prohibition against driving. Just a few days more than five years after that the offence that's before the court occurred, so little more than five years after the judicial prohibition expired, this offence took place.

_45_ The court has considered, very carefully, the representations of counsel. This is not a joint submission, as it was in *Mantha*, and the court would also point out that it sees *Mantha* as quite different circumstances. But the court has given the concurrence of the submissions, considered what it would do if this had been a joint submission, and in the court's view, even if it was a joint submission, the sentence in this case, that is proposed, is one which the court feels would bring the administration of justice into disrepute. It does not, in the court's view, reflect the seriousness of the incident, nor the fact this is a--not a first conviction. In some cases, a sentence of a large fine can be equally or more effective than a short period of incarceration. But here, we have evidence of a fine and a suspension and it has not been sufficient to deter you, Master Corporal Deans, from reoffending. Please stand, Master Corporal Deans.

_46_ Master Corporal Deans, the court sentences you to the minimum punishment it deems necessary to protect the public in this matter, and that is 14 days' imprisonment. The court has pronounced this sentence at 1912 hours on the 25th day of May, 2004. Mr Defence Counsel, pursuant to QR&O article 118.03, do you have an application for release pending appeal to deliver to the court at this time?

_47_ DEFENCE COUNSEL: Not at this time, Your Honour. However, I can certainly indicate that we may have such an application tomorrow.

_48_ MILITARY JUDGE: Then, as you have indicated, you are aware if you intend to make an application for release pending appeal to this court you must comply with QR&O article 118.03 within 24 hours. The proceedings of this court martial in respect of Master Corporal Deans are terminated subject to an application for release pending appeal pursuant to QR&O article 118.03.

_49_ Master Corporal Deans, as the sentence is currently in force, that means that the sentence of imprisonment begins at this time and you are currently in custody, and as such concurrent with that is a reduction in rank to private. So march out Master Corporal Deans now.

COLONEL K.S. CARTER, M.J.

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