Citation: *R. v. Ex-Private M.S. Constantin*,2004CM29

Docket: S200429

STANDING COURT MARTIAL
CANADA
QUEBEC
QUEBEC AREA TRAINING CENTRE OF THE GROUND FORCES
VALCARTIER GARRISON
VALCARTIER

Date:4 February 2005

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

HER MAJESTY THE QUEEN
Prosecutor
v.
EX-PRIVATE M.S. CONSTANTIN
(Accused)

SENTENCE
(Rendered orally)

OFFICIAL ENGLISH TRANSLATION

[1] Mr. Constantin, please rise. Before pronouncing the sentence, ex-Private Constantin, the Court having accepted and entered your plea of guilty to the first and third counts, the Court now finds you guilty of the first and third counts.

[2] For sentencing purposes, the Court has taken into account, among other factors, all of the circumstances surrounding the commission of the offences to which you have pleaded guilty as disclosed in the summary of the circumstances the truthfulness of which you have formally accepted and which was filed in this Court as exhibit 5. The Court has also taken into account all of the evidence presented in the part of the hearing in relation to sentencing, that is, the documentary evidence that is the subject matter of exhibits 3 and 4 and exhibits 6 to 10; and the testimony of Captain Martineau and your own testimony. The Court has examined this evidence in terms of

the applicable sentencing principles, including the objectives and principles contained in sections 718, 718.1 and 718.2 of the *Criminal Code* where they are not incompatible with, on the one hand, the necessary requirements for guaranteeing the maintenance of a disciplined, operational and effective armed force; and, on the other hand, where they are not incompatible with the sentencing regime under the *National Defence Act*. And finally, the Court has taken into account the submissions by counsel and the case law they have submitted.

[3] Mr. Constantin, a private at the time of the commission of the offences, pleaded guilty to a charge laid under section 130 of the *National Defence Act*, trafficking in a substance that he represented or held out to be cannabis marihuana contrary to subsection 5(1) of the *Controlled Drugs and Substances Act*. He also pleaded guilty to a charge laid under section 129 of the *National Defence Act*, conduct to the prejudice of good order and discipline, for having used a drug in the form of cannabis marihuana, contrary to the drug policy of the Canadian Forces.

[4] In *R. v. Généreux*, [1992] 1 S.C.R. 259, 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." The Court noted that in the special context of military discipline, breaches of discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. These guidelines of the Supreme Court, however, do not allow a military tribunal to impose a sentence composed of one or more sentences that would go beyond what is required in the circumstances of the case. In other words, any sentence handed down by a court, whether civilian or military, must always represent the minimum necessary intervention.

[5] When giving an accused an appropriate sentence for the misconduct he has committed and in regard to the offences for which he is guilty, certain objectives are addressed in light of the applicable principles. It should be noted that these objectives and principles vary slightly from one case to another, but the importance assigned to each must be adapted to the circumstances of the case. To contribute to one of the essential objectives of military discipline, the maintenance of a professional, disciplined, operational and effective armed force in the context of a free and democratic society, these objectives and principles may be set out as follows:

> First, protection of the public, and the public here includes the Canadian Forces;
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> Second, punishment and denunciation of the offender;

> Third, deterrence of the offender, or of anyone, from committing the same offences;
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> Fourth, to separate the offender, where necessary, from society including members of the Armed Forces;
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> Fifth, rehabilitation and reform of the offender;
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> Sixth, proportionality to the gravity of the offences and the degree of responsibility of the offender;
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> Seventh, harmonization of sentences;
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> Eighth, resort to deprivation of liberty only where the Court is satisfied that this is the penalty of last resort; and
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> Finally, the Court will take into account the mitigating and aggravating circumstances related to the situation of the offender and the commission of the offences.

[6] In this case, the protection of the public will be achieved by a sentence that puts the emphasis on the denunciation of the alleged acts, collective and individual deterrence and the rehabilitation of the offender.

[7] In considering which sentence would be appropriate, the Court has considered the following aggravating factors and mitigating factors. And I will begin with the factors that aggravate the sentence. The Court considers the following factors to be aggravating:

1. The nature of the offence and the penalty provided by Parliament. In the case of the first charge, the offence of trafficking in cannabis marihuana is liable to five years of imprisonment for quantities of less than 3 kg. In the case of the third charge, conduct prejudicial to good order and discipline under section 129 of the National Defence Act, for having consumed drugs contrary to the Canadian Forces policy in such matters, it is punishable by dishonorable discharge from her Majesty's service. These offences are objectively serious.

2. The fact that you more than once engaged in such trafficking on a military facility, more particularly in the quarters for unmarried military personnel assigned to stand-by squad. The circumstances of this case disclose that you sold variable quantities of cannabis to four of your colleagues, which might vary from a 3.5 gram joint over a period of about one month and a half between April and June 2003. It appears that this trafficking was engaged in at the request of your colleagues and that you did it in order to be able to finance your own consumption of cannabis.

3. The fact that you consumed drugs on a daily basis during this period in the quarters of the Valcartier garrison, when you were well aware of the drug policy of the Canadian Forces. This is particularly significant, because you were enrolled in the regular force on June 12, 2002, but especially because you had been a member of the reserve force from 1997 on as a military policeman. Not only were you doubly aware of the drug policy of the Canadian Forces, but you knew its effects.

4. The fact that you carried out your illegal transactions, displaying a certain degree of sophistication and planning when you stored a scale and a coffee grinder for cannabis trafficking inside two pigeonholes in the basement of the unmarried quarters to which you had obtained access by making a copy of the key of a friend who had resided in that location.

5. The fact that there was, according to the testimony of Captain Martineau, an unhealthy atmosphere within the standby squad during this period, when a number of soldiers were engaging with impunity in the consumption of drugs in the quarters.

As to the mitigating factors, the Court notes the following:

1. The fact that you have pleaded guilty and that you have displayed from the beginning of the investigation process, by confiding to the military police that you had engaged in the use and trafficking of narcotics, as is indicated by the summary of the circumstances. These guilty pleas are, in the opinion of this Court, a genuine indication of the sincerity of your guilty pleas. During your testimony you publicly apologized for the harm that you have caused to your colleagues and to the Canadian Forces through your unlawful activities. The Court considers these factors a sincere and tangible indication of the remorse that you feel for your reprehensible acts.

2. The fact that this is a so-called soft drug in the context of having used

this drug.

3. The absence of any conduct sheet or criminal record related to drugs.

4. The fact that you were at that time experiencing some difficult moments. The Court does not accept the thesis that you were consuming cannabis marihuana for therapeutic purposes, but it does recognize that during the period covered by the charges you were physically incapable of continuing your training, and that this situation had a spillover effect on your capacity to cope with this disturbing situation. According to the evidence, your dreams of becoming a full-time member of the Canadian Forces were dissipating. You allowed yourself to become discouraged and you lost your motivation. This does not excuse your actions, but it is the context in which you began to consume cannabis marihuana and to accommodate your colleagues who were consuming that substance in order to finance your daily consumption.

5. The fact that the uncontradicted evidence before this Court indicates that you had developed a dependency on drugs during that period, at least, a subjective psychological dependency. The Court considers this a mitigating factor in the context that the trafficking was not done for the purpose of profit other than to finance your own consumption.

6. The fact that you took some positive steps relatively early to put an end to your conduct attributable to your dependency on drugs after you had realized your errors. However, it is necessary to be prudent when the time comes for assessing the sincerity and impact of such steps in sentencing. The documentary evidence on your therapy and follow-up, in light of your own testimony, is particularly persuasive. Your approach was extremely sincere and serious. The Court notes from this testimony that you became or became again a responsible motivated and active young man in your community. Once released from the Canadian Forces in July 2004, you found yourself a job. Since September 2004, you have held a full-time permanent job as a customer service representative for Solution Anjura with Bell Sympatico. From what you say, your opportunities for advancement are excellent. The Court draws attention to the degree of motivation that you display when you speak of your new career. It is also appropriate to recognize that you are now living with your parents in the Montréal area and that they are contributing in their way to your social rehabilitation. You seem to me to have acquired a level of maturity and judgment that were not present in the spring of 2003.

7. The fact that you have already lost your job within the Canadian Forces for reasons directly related to the cases now before the Court. This consequence is highly significant in the context of this case. It must be taken into account in the assessment of the denunciation and deterrence criteria that are applicable in this case and the Court does not agree with the prosecution's submissions to the contrary effect.

8. Your youthfulness at the time of the commission of the offences.

9. The time elapsed since the commission of the offences.

[8] In *R. v. Gladue*,[1] the Supreme Court held that a sentence of imprisonment should be the penal sanction of last resort. In the *Criminal Code* context, incarceration in the form of imprisonment is adequate only when no other sanction or combination of sanctions is appropriate for the offence and the offender. This principle is relevant in the context of military justice. However, it is important to take into account the significant differences between the sentencing regime applicable to a civilian criminal and penal Court as opposed to a military Court whose powers on sentencing are covered in the *National Defence Act*. The civilian criminal justice system has its particular features such as, for example, the conditional sentence, which differs from probation but nevertheless constitutes a genuine sentence of imprisonment. The military justice system, for its part, has such disciplinary tools as detention, which is aimed at rehabilitating military inmates and restoring to them the habit of obeying in a military context structured around the particular values and skills of members of the Canadian Forces. Like the conditional sentence, detention can have a significant denunciatory and deterrent effect without however stigmatizing military inmates to the same degree as soldiers sentenced to imprisonment. However, such a sentence is not appropriate in drug trafficking matters.

[9] Drug trafficking is a very serious offence in itself but it is even more serious in the military context owing to the pernicious effects of drug use. It was in fact to counter these effects that the Canadian Forces set up the Canadian Forces Drug Control Program. If the only charge before this Court were linked to the use of cannabis marihuana, the order and degree of importance assigned to each of the applicable sentencing principles would be different. However, such is not the case.

[10] When the act as charged goes beyond the disciplinary framework and constitutes a strictly criminal activity, it is necessary to examine the offence not only in light of the particular values and skills of members of the Canadian Forces, but also from the perspective of the exercise of concurrent penal jurisdiction.

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[1] (1999), 133 C.C.C. (3d) 385.

[11] An analysis of the military case law on trafficking in drugs and other substances in recent years indicates to us that incarceration in the form of imprisonment is the preferred penalty in order to guarantee protection of the public and the maintenance of discipline through general and individual deterrence, punishment of the offender and rehabilitation. In trafficking matters, however, the Court agrees with the opinion expressed by the Québec Court of Appeal in *R. v. Lebovitch* (1979), 48 C.C.C. (2d) 539, which recognizes that in the search for proportionality between the gravity of the crime and the degree of responsibility of the offender, it is appropriate to make a distinction between the user-trafficker who is acting in order to pay for his own drugs and someone who acts only for the purpose of profit, especially when the user-trafficker offender manages to stop consuming drugs. As is the case in this matter, ex-Private Constantin was not trafficking in marihuana solely for the lure of profit. According to the evidence we heard, he was being supplied by a military colleague, ex-Private Hébert-Painchaud, for his personal consumption and reselling a portion to other colleagues in order to finance that consumption. In relation to the principle of harmonization of sentences, ex-Private Hébert-Painchaud was tried by a standing court martial in September 2004 for more or less similar offences. Pursuant to the common suggestion of prosecution and defence counsel, the standing court martial sentenced him to 60 days imprisonment. The evidence presented at the sentencing hearing was relatively brief and clearly less favorable than in the present case.

[12] The Court is of the opinion that the circumstances of this case do not justify a different approach, however. A sentence that includes a term of imprisonment is still necessary in order to ensure the protection of the public and the maintenance of discipline in the interest of collective deterrence, denunciation of the unlawful conduct and the seriousness of the offences as charged in the context of military discipline, all of which are principles of prime importance.

[13] However, the evidence in this case is particularly persuasive in so far as the offender's attempts at rehabilitation and social reintegration since the events are concerned. Of course, it would no doubt be easy to say that he did not really have a choice, having been released from the Canadian Forces in July 2004 as a result of the acts that are the subject matter of the charges before this Court. But it must be said that ex-Private Constantin has really taken himself in hand. No doubt he had some interest in trying to save his career by undergoing therapy. His course has taken him elsewhere. The military authorities upheld the recommendation of release under the Canadian Forces drug policy and he was released. The months that followed his release, and up to now, are testimony to his sincere desire not only to overcome this dependency but also to be an active and useful member of society. How many young adults choose instead the easy course of sponging off society or hanging out in a criminal milieu once they have tasted the pleasures of drugs and the proceeds of crime?

[14] In light of the circumstances of this case and the evidence before this Court, the Court thinks that an adequate sentence should comprise at least a minimum term of imprisonment of 45 days accompanied by one or more penalties. I subscribe to the comments of Madam Justice Rousseau-Houle of the Quebec Court of Appeal in *R. v. Prokos*,[2] where she states, on behalf of the majority:

> 34. Offences involving the trafficking of narcotics must always be clearly and severely condemned. ... One must, however, avoid entertaining the myth, in the name of general deterrence and by invoking the intrinsic gravity of the offences, that the only valid and deterrent punishment is a term of incarceration.
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> 35. The individualization of sentences remains a fundamental principle in sentencing. With respect to offences involving drugs, the sentencing system cannot be based exclusively on social deterrence and denunciation of the gravity of the offences. Sentencing must be adjusted to the person, and individualized. It is for the judge, on whom the duty to determine the sentence lies, to choose a sentence which had the most chances of deterring the offender and of ensuring his rehabilitation, all the while protecting the community.
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> 36. While the criterion of general deterrence constitutes a consideration of primordial importance, it remains none the less that the criterion of rehabilitation, where it has been convincingly demonstrated, may become the pre-eminent factor in the determination of the sentence. ...
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> 45. The Courts can no longer systematically invoke the principles of general deterrence and denunciation which have made imprisonment the norm and not the punishment of last resort. The obligation to consider less restrictive sanctions than the deprivation of liberty where the circumstances justify it, is imposed on judges by sections 718.2(d) and 718.2(e). ...

[15] These remarks by Madam Justice Rousseau-Houle, who is also a judge in the Court Martial Appeal Court, were made in the context of a case involving trafficking and possession for the purpose of trafficking in heroin in which the defendant had been ordered to serve a conditional sentence of 23 months. Such a penalty does not exist under the Code of Service Discipline. With respect for the contrary opinion, this Court is of the opinion that the remarks by Madam Justice Rousseau-Houle are not addressed only to conditional sentences in lieu of sentences of incarceration.

[16] It must be acknowledged that some of the principles that appear in sections 718.1 and 718.2 of the *Criminal Code* are hard to apply in the context of military justice and the sentencing regime under the *National Defence Act*. Although the Court Martial Appeal Court has long recognized, for example in *R. v. Macdonald*[3] and *R. v. MacEachern*,[4] that illegal drug use and trafficking clearly entail serious

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[2] [1998] A.Q. No. 2374.
[3] (1983), 4 C.M.A.C. 277.
[4] (1984), 4 C.M.A.C. 447.

consequences in terms of discipline and are incompatible with the proper performance of military duties, the Court Martial Appeal Court has not issued any guidelines in favour of mandatory prison sentences irrespective of the circumstances in such matters. It is true that the Court Martial Appeal Court, in *R. v. Dominie*,[5] did rule accordingly, but in the particular context of crack or cocaine trafficking, and without absolutely ruling out the possibility that a prison sentence could be suspended in very rare cases where there exist extremely important mitigating circumstances. Mr. Justice Ewaschuk, on behalf of the Court, made the following comments:

> [4] The appellant first argues that the learned President erred in finding that incarceration was the only sentence available to him. It is our view that the trial judge did not err in finding that the incarceration was the only sentence available in the circumstances of this case.
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> [5] Trafficking in crack cocaine on numerous occasions, even though it is non-commercial in nature, generally requires the imposition of actual imprisonment even for civilian offenders. In respect of military offenders, general deterrence requires that the military know that they will be imprisoned if they deal in crack cocaine on military bases. Suspended sentence simply is not available, except in the rare case of extremely mitigating circumstances. This is not one of those rare cases.

[17] This Court is of the opinion that this decision of the Court Martial Appeal Court is not authority for holding that trafficking in cannabis marihuana and the use of such drugs in circumstances like those that are present in this case requires a mandatory prison sentence.

[18] The Canadian Armed Forces are not a distinct society operating in a vacuum immune from the fundamental values of Canadian society. It must be recognized, however, that they have some specific needs flowing directly out of the nature of their existence as an institution and the mandates conferred on them by the Government of Canada. When the military authorities decide to exercise their power to release an individual who has violated the Canadian Forces drug policy before that person has been tried, this decision may be perfectly justified. This typically is done in the interests of operational efficiency and disciplinary imperatives. However, when a military Court is trying a posteriori a case like the one here in which the accused has since been released, this Court must take into consideration all of the aggravating and mitigating circumstances, including those subsequent to the release of the accused.

[19] The evidence of Mr. Constantin's rehabilitation and social reintegration is particularly persuasive. It began when he was still a soldier, but it has continued

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[5] 2002 CMAC 8.

subsequently to the point that this Court had to analyze carefully the consequences that an actual prison sentence would have both on the offender and on the community as a whole. The uncontradicted and credible evidence before the Court indicates that a sentence of incarceration would no doubt mean the loss of Mr. Constantin's full-time permanent employment. This in itself would be a consequence for which he alone is responsible. However, the analysis is not limited to this factor alone. The offender's sincere and notable efforts for more than a year to get control over his life would be greatly undermined if the Court refused to consider the suspension of a prison sentence. Furthermore, an actual prison sentence in the particular context of this case would, as a consequence in addition to the loss of a permanent job, carry the message that exemplary efforts at rehabilitation are useless. It should also be taken into account that there is a significant risk of abandonment of his rehabilitation process if the Court were to place unjustly exaggerated emphasis on the punitive nature of the applicable punishment. Finally, there is the unfortunate possibility that once his prison sentence has been served, and he has lost his job and his motivation, the offender will become an economic and social burden on the community as a whole. This is not a desirable situation in the case of a young adult who has taken some major steps to put himself back on the right course after having deviated from it for a few months, leaving behind a part of his dreams, including a military career, along the way.

[20] Consequently, Mr. Constantin, please rise, the Court sentences you to imprisonment for 45 days accompanied by a fine of $2,500. For the reasons cited previously and more specifically in regard to the particularly convincing demonstration that was made before the Court concerning your rehabilitation and social reintegration process, the Court, in its staying authority, suspends the execution of the prison sentence to which it has sentenced you.

[21] Madam Prosecuting Attorney, please inform the counsel for the defence, at the earliest opportunity, of the full particulars on where the offender may pay the fine imposed by the Court.

LIEUTENANT-COLONEL M. DUTIL, M.J.

Counsel:

Major M. Trudel, Eastern Regional Military Prosecutor
Counsel for the prosecution
Jean Asselin, Labrecque, Robitaille, Roberge & Asselin, 400 Jean-Lesage Blvd., Québec, Quebec

Counsel for ex-Private M.S. Constantin