

Citation: *R. v. Private N.W. Lui*, 2004CM07

Docket: S200407

**STANDING COURT MARTIAL
CANADA
ONTARIO
FORT YORK ARMORY TORONTO**

Date: 26 May 2004

PRESIDING: COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN

v.

PRIVATE N.W. LUI

(Accused)

SENTENCE

(Rendered orally)

[1] Private Lui, you may break off and be seated beside your defence counsel.

[2] Private Lui, having accepted and recorded your pleas of guilty to charges number two, three and four, the court now finds you guilty of charges two, three and four, and orders a stay of proceedings with respect to charge number one.

[3] It now falls to me to determine and to pass a sentence upon you. In so doing I have considered the principles of sentencing that apply in the ordinary courts of criminal jurisdiction in Canada and at courts martial. I have, as well, considered the facts of the case, as described in the statement of circumstances, Exhibit 3, the evidence heard during the mitigation phase and the submissions of counsel both for the prosecution and for the defence.

[4] The principles of sentencing guide the court in the exercise of its discretion in determining a fit and proper sentence in an individual case. The sentence should be broadly commensurate with the gravity of the offence and the blameworthiness or degree of responsibility and character of the offender. The court is guided by the sentences imposed by other courts in previous similar cases not out of a slavish adherence to precedent, but because it appeals to our common sense of justice that like cases

should be treated in similar ways. Nevertheless, in imposing sentence, the court takes account of the many factors that distinguish the particular case it is dealing with, both the aggravating circumstances that may call for a more severe punishment and the mitigating circumstances that may reduce a sentence. The goals and objectives of sentencing have been expressed in different ways in many previous cases. Generally, they relate to the protection of society, which includes, of course, the Canadian Forces, by fostering and maintaining a just, a peaceful, a safe and a law-abiding community. Importantly, in the context of the Canadian Forces, these objectives include the maintenance of discipline, that habit of obedience which is so necessary to the effectiveness of an armed force. The goals and objectives also include deterrence of the individual so that the conduct of the offender is not repeated, and general deterrence so that others will not be led to follow the example of the offender. Other goals include the rehabilitation of the offender, the promotion of a sense of responsibility in the offender and the denunciation of unlawful behavior. One or more of these goals and objectives will inevitably predominate in arriving at a fit and just sentence in an individual case. Yet, it should not be lost sight of that each of these goals calls for the attention of the sentencing court and a fit and just sentence should be a wise blending of these goals tailored to the particular circumstances of the case.

[5] As I explained to you when you tendered your pleas of guilty, section 139 of the National Defense Act prescribes the possible punishments that may be imposed at courts martial. Those possible punishments are limited by the provision of the law which creates the offence and provides for a maximum punishment and is further limited to the jurisdiction that may be exercised by this court.

[6] Only one sentence is imposed upon an offender, whether the offender is found guilty of one or more different offences, but the sentence may consist of more than one punishment. It is an important principle that the court should impose the least severe punishment that will maintain discipline. In arriving at the sentence in this case, I have considered the direct and indirect consequences of the findings of guilt and the sentence I am about to impose.

[7] Briefly put, the facts of this case disclose that, on the date alleged, the offender became involved in a verbal altercation with Corporal Hillar, a co-worker of the offender, in the company stores at the Area Training Centre in Meaford, Ontario.

[8] The offender and Corporal Hillar had not been getting along and the offender describes their working relationship as strained. Indeed, the offender attempted to reduce his contact with Corporal Hillar to a minimum. The verbal altercation involved exchanges of insults using a common expletive and it appears that Corporal Hillar was the first one to resort to such language. The offender pointed his finger at Corporal Hillar and Corporal Hillar slapped it away, whereupon the offender accused Corporal Hillar of hitting him. The offender took a seven-inch-folding knife

from his pocket, unfolded the blade, and pointed it at Corporal Hillar. The situation was broken up by other members present. Shortly afterwards, the offender presented himself to the MPs and was arrested. The knife was taken from him. The knife was capable of opening by a rapid motion of the hand that was demonstrated by the offender in his evidence before me. The knife, as described, is commonly referred to as a switchblade. It is a prohibited weapon. The offender testified that he acquired the knife at a retail outlet in Toronto perhaps a couple of years prior to the offence date and testified that he used the knife to perform some work related duties.

[9] The prosecution points to the objective gravity of these offences in support of a sentence of imprisonment of 30 to 60 days. The prosecution also seeks an order authorizing the taking of DNA samples, for the purpose of the DNA databank, and also seeks a weapons prohibition order.

[10] The defence counsel for the offender suggests a disposition by way of a reprimand and a fine in the area of \$3000. The defence points out that a DNA order is not mandatory in these circumstances and submits that a weapons prohibition order should not be for any greater period than 12 months. In the event the court were to decide that a sentence involving incarceration should be imposed, the defence submits that the period should not exceed 14 days.

[11] In my view, the offences committed were very serious. They involve the immediate threat of serious harm to Corporal Hillar, to whom the offender was a subordinate, by the use of a weapon which is itself a prohibited weapon. This conduct cannot be tolerated in a military environment that requires a duty of loyalty on the part of all members to those members who are of a higher rank.

[12] A switchblade knife is prohibited for a reason. Not because it is well adapted, as the offender testifies, to be used as a tool, but because it is inherently dangerous since the blade is ordinarily concealed until the weapon is produced for use. There is no reason that I can accept for the offender to have been in possession of such an item. That such a weapon should be drawn against any other member, and especially a higher ranking member, is inimical to the military ethos.

[13] I have taken full account of several mitigating factors in this case. The offender is before the court for the first time and at the time of the offence was 20 years of age. He is described as a good soldier who regrets the lack of self-control that he displayed on the occasion in question. There was no actual bodily harm caused to Corporal Hillar. The offender spent some hours in the custody of the military police when he surrendered to them shortly after the incident on the advice of someone else. He is a part-time student studying to teach English in civilian life and working part-time. I have taken account of the consequences for the offender of both the findings of guilt and the sentence I am about to impose. I have also taken account of the probable

consequences of these matters for the offender in his civilian life. I recognize that for a relatively young first offender a sentence involving incarceration should be a last resort. Nevertheless, in my view, the circumstances, both of the offence and the offender, require such a disposition in this case.

[14] In my view, considering the objective gravity of the offence, the immediate threat posed by the offender to Corporal Hillar and the fact that the response of the offender to aggravate the situation was out of proportion to the verbal insults that preceded it, the minimal infringement of the privacy interest of the offender, and the salutary effects for the administration of justice, this is a proper case to make a DNA order. In this connection I refer to the cases of *R. v. Hendry* (2001), 161 C.C.C. (3d) 275; *R. v. Briggs* (2001), 157 C.C.C. (3d) 38, both decisions of the Ontario Court of Appeal, leave to appeal to the Supreme Court of Canada having been refused in the Briggs case. I also have in mind the dispositions of the Ontario Court of Appeal in the cases of *R. v. Jackpine*, and *R. v. Rogers*, both decided March 15th, 2004.

[15] I also consider that this is a proper case for a weapons prohibition order. If this case had been prosecuted in the civilian courts, a weapons prohibition order would be mandatory under the terms of section 109 of the *Criminal Code*. In view of the admitted fact that the offender will be released by administrative proceedings, the weapons prohibition order will extend to any such items which would otherwise be required in the course of the offender's duties as a member of the Canadian Forces.

[16] Stand up, Private Lui. You are sentenced to imprisonment for a period of 45 days. The sentence is pronounced at 1629 hours, 26 May 2004.

[17] Pursuant to section 196.14 of the *National Defence Act*, I make an order authorizing the taking of such DNA samples as may be required.

[18] Pursuant to section 147.1 of the *National Defence Act*, I make an order prohibiting you from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, or explosive device for a period of ten years from today's date. You shall forfeit any such items that might presently be in your possession.

[19] March out Private Lui.

[20] Subject only to any application under section 248.1 of the *National Defence Act*, the proceedings of this court martial in respect of Private Lui are hereby terminated.

COMMANDER P.J. LAMONT, M.J.

Counsel:

Captain A.J. Carswell, Director Military Prosecutions Ottawa
Counsel for Her Majesty the Queen
Major S.E. Turner, Directorate of Defence Counsel Services
Counsel for Private N.W. Lui