Citation: *R. v. Corporal MacMullin,*2004CM46

Docket: S200446

STANDING COURT MARTIAL
CANADA
NEW BRUNSWICK
ASU/CFB GAGETOWN

Date: 20 March 2004

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

HER MAJESTY THE QUEEN
v.
CORPORAL D.G. MACMULLIN
(Accused)

SENTENCE
(Rendered orally)

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[1] The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency, and morale of the military. However, the punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances.

[2] In determining sentence today, the court has considered the circumstances surrounding the commission of the offence as introduced before the court during the trial as well as the evidence heard during the sentencing hearing, the representations made by counsel, and also the applicable principles of sentencing.

[3] The principles to be used in considering what is an appropriate sentence normally relate to the following: firstly, the protection of the public, and public includes the Canadian Forces; secondly, the punishment of the offender; thirdly, the deterrent effect of the punishment, not only on the offender, but also upon others who might be tempted to commit such offences; and fourthly, the reformation and rehabilitation of the offender.

[4] The prime principle is the protection of the public, including the Canadian Forces, and the court must determine if that protection would be best achieved by deterrence, rehabilitation, or punishment. How much emphasis should be put on one or more of these principles will vary depending on the case and its circumstances. In some cases, the dominant principle, if not the only principle, will be deterrence, either general or specific, or both. In other cases, the emphasis will be put on the offender's rehabilitation and reformation.

[5] In a case such as this one and its particular circumstances, where we are dealing with primary military good order and discipline in respect of officers, the court believes that the emphasis should be put on general and specific deterrence as well as punishment. The court also considers that the sentence must be proportionate to the gravity of the offence and, in this case, respect the principle of parity of sentences.

[6] In arriving at what the court considers a fair and appropriate sentence, the court has considered the following factors:

First, the objective gravity of this offence. The maximum punishment for an offence under section 84 of the *National Defence Act* is imprisonment for life, and it is a very, very serious offence;

Second, the absence of a conduct sheet and of criminal record;

Third, the fact that there is no evidence before the court that you have a propensity to commit violent acts or that violent acts were ever committed by you in the past. It seems that you have been prohibited in playing competitive hockey with the unit as a result of these incidents apparently because unit authorities did not want to expose you to a potentially hazardous situation. Hockey is apparently very important to you and you have been deprived, as a result, in pursuing a sport that you like and in which you perform, the court understands, at the national level. However, I note that there is no evidence or knowledge by your Regimental Sergeant-Major that you have ever been involved in any incident of violence while you were playing the game of hockey. So if this measure was preventive, other reasons must have been considered by the unit. These reasons are not known to the court;

Fourth, I considered your rank, your age, as well as your social, family, and financial situation;

Fifth, the particular context of this case as revealed by the overwhelming evidence before the court. You assaulted a superior officer in the presence of other CF members, and you were highly involved in the turmoil that has caused a significant disturbance in the civilian neighbourhood;

Sixth, the fact that you caused bodily harm to Lieutenant Cahill. Although the violence of the assault was nowhere near as serious as the one in the cases of *Sergeant Mallette* or in the case of *Private Turgeon*, you nonetheless injured Lieutenant Cahill and he has not fully, as of yet, resumed all activities as a result of his injured tear duct. The fact that Lieutenant Cahill was injured is not indicative of the degree of force used in committing the assault. There is no evidence before the court to support the view that the violence used was excessive. The evidence is more to the effect that the injury resulted from a finger or a thumb touching the eye lid which unfortunately required the insertion of a small tube in the tear duct and two or three stiches;

Seventh, the fact that alcohol was involved, including the consumption of alcohol by the victim whose own behaviour may have been questionable in the circumstances of this case, especially in light of the testimony of Corporal Brostowski who was the only sober person out of six persons and the fact that Private Gillis was the most contributing or the most significant factor in this incident as she was completely drunk and out of control;

Eighth, the fact that you are a good worker slightly above average;

Ninth, the fact that you were assaulted by Private Gillis at that time for which she was tried for assault and drunkenness and was sentenced to a fine in the amount of $800;

Tenth, the fact that the assault occurred where people were not on duty, not in uniform, and after having attended at a social gathering where drinking is not only tolerated but was seen as normal;

Eleventh, the fact that you have made a public apology today, in court, and which I consider an indication of remorse and acceptance of responsibility for your actions.

[7] The prosecution recommends that this court sentences you to a period of detention of 90 days. In addition, the prosecution asks this court to issue a prohibition order to possess weapons, other than service weapons, under section 147.1 of the *National Defence Act*.

[8] The prosecution also asks this court issue a DNA order under section 196.11 of the *Act* because an offence under section 84 is a secondary offence, but more importantly, because bodily harm was involved and such an offence constitutes a primary designated offence.

[9] In support of its recommendation, the prosecution submits that this case is as serious as the cases in *Mallette* and *Turgeon* in which the offenders were each

sentenced to periods of detention. As indicated by the prosecutor, I was the military judge presiding at each of these standing courts martial. I totally disagree with her appreciation of how the case of Corporal MacMullin should be viewed in light of these two decisions.

[10] Malette was on duty in Bosnia, not on camp, outside the camp. He was carrying a loaded weapon as well as the lieutenant and the driver. The level of threat was low; however, a threat was present. His attack on his young lieutenant may well have been short, but it was extremely violent including kicking severely his victim in the face when that person was lying on the ground motionless.

[11] As to the case of *Private Turgeon*, the prosecutor, who, if I remember correctly, was also the prosecutor in that case, the court considered that his attack was of an extreme violence and was vicious. As I recall, Turgeon had found his 16-year old sister having consensual sex with another person in the bushes during a militia exercise. The sister and the victim were undressed as the victim was on top of her. There is no need to be more specific and provide more details. In any case, this is when the accused grabbed the victim in that precarious position, taking him by surprise, and started to punch him violently and left him there after.

[12] I understand that these precedents are used for guidance, but it is always difficult to take a set of facts outside its specific context. In the circumstances of this case, the court is satisfied that a period of incarceration is not necessary to ensure the protection of the public and general deterrence.

[13] The court is also of the view that the circumstances of this case including the low level of violence used and the fact that you were also assaulted by Private Gillis during the same events does not require or make it desirable, in absence of any other evidence, in the interests of your own safety or that of any other person, that the court make an order prohibiting you from possessing weapons.

[14] The court is also not satisfied, in absence of any other evidence, that it is in the best interests of the administration of justice to issue a DNA order.

[15] Corporal MacMullin, the court sentences you to a severe reprimand and a fine in the amount of $1800 payable in equal payments over a period of 12 months. Should you be released from the Canadian Forces prior to the full payment of that fine,

the unpaid balance will become due and payable in full prior to the effective date of release.

LIEUTENANT-COLONEL M. DUTIL, M.J.

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