

Citation: *R. v. Corporal M.J. Kemp*, 2004CM06

Docket: S200406

**STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE PETAWAWA**

Date: 8 April 2004

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

HER MAJESTY THE QUEEN

v.

CORPORAL M.J. KEMP

(Accused)

SENTENCE

(Rendered orally)

[1] Corporal Kemp, in determining the appropriate sentence, the court has considered the circumstances surrounding the commission of these offences, your background and current circumstances, your testimony and that of Warrant Officer Bush and Captain Graham, the evidence before the court in the main trial, the submissions of counsel both the prosecution and the defence, and the principles of sentencing.

[2] Although already reviewed briefly by the prosecutor, it is no doubt useful to explain that this court must and does follow certain principles in determining what is an appropriate sentence. These include protection of the public, punishment of the offender, deterrence both general and specific, and reformation and rehabilitation, and in any particular case, the court has to determine which one or more than one of those principles are the predominant principles to apply. In the context of a court martial the primary interest is the maintenance or restoration of discipline, which has been described as a willing and prompt obedience to lawful orders. Lawful orders may not be in an individual's own personal interest. They may have a detrimental or even a fatal consequence for CF members. Compliance with lawful commands in stressful and critical situations that Canadian Forces members are put into, such as disasters, such as deployments with which you are familiar, and in combat, must be able to be relied upon.

[3] In this situation, given the nature of the offences; that is, disobedience of a lawful command and conduct to the prejudice of good order and discipline, the court agrees with counsel that general deterrence is the primary principle to be applied. However, the court also considers that specific deterrence and reform and rehabilitation have secondary roles.

[4] General deterrence means that the sentence imposed should deter not simply the offender from re-offending but also others in similar situations from engaging, for whatever reasons, in the same prohibited conduct.

[5] In addition, the court must and has taken into account proportionality, which on the one hand argues that sentences for similar offences by similar offenders committed in similar circumstances should not be significantly different. On the other hand proportionality requires, as does QR&O 112.48, that any sentence take into account not only the nature of the offence but also the background; that is, the previous character of the convicted person, and QR&O 112.48 also requires that this court take into account any direct or indirect consequences of any finding and sentence it imposes upon you.

[6] How serious are these offences? Disobedience of a lawful command is a serious military offence. This court martial because it is a standing court martial could not impose the maximum punishment under any circumstances. The maximum punishment this court could impose is dismissal with disgrace and in terms of imprisonment, imprisonment for less than two years. However, disobedience of a lawful command does strike at the heart of the military system and it is more serious objectively than absence without leave. A section 129 conviction may be more or less serious, depending on the circumstances. Here the situation is one where you lied to a direct supervisor about a duty related matter. It is reasonably serious but not the most egregious example of such an offence.

[7] The circumstances surrounding the commission of this offence have been set out in some detail during the trial. What the court would say is that both these offences occurred during a relatively brief period of time; that is, one afternoon. They occurred during a situation where you were clearly upset and when you felt aggrieved by your perceived mistreatment by members of your chain of command. At the same time, however, your actions put an additional burden on your fellow soldiers.

[8] In terms of assessing your previous character, there are a number of mitigating factors, the first one is you're a first offender. You are, however, an experienced member of the Canadian Forces with 14 years in the service. The evidence before the court is that you have been an average soldier but your performance has started to deteriorate in recent times and that this was addressed by administrative action including recorded warnings and counselling and probation. In essence, the evidence before the court is that in recent years you've become unreliable. The court

accepts that to some degree this as a result of stressful personal circumstances but also to some degree from factors within your control. It is clear from the exhibits that were presented, particularly Exhibit 10 and Exhibit 11, that you are capable, if motivated, of acting in a reasonable and, indeed, an admirable fashion. You impressed your officer to the extent that he recommended your occupational transfer. The court has reviewed Exhibit 11, which is the report of your admin NCO course from July 2002. There it indicates that you performed all your assigned tasks to a high standard, that you were organized, that you, in that situation, kept all your superiors well informed, and it, as your counsel's indicated, goes on to say you were recommended to return as an admin NCO on further leadership courses, however, it also has a comment under personal abilities and that says:

Corporal Kemp must understand that the easiest way to complete a task is not always the proper way and that the easy way may lead to confusion.

And that seems particularly relevant given the offences that you've been convicted of.

[9] The court accepts that this court martial is only part of the problem that you face right now, you apparently are facing, potentially, release under article 5f, which is a release as unsuitable for further service due to factors within your control which make you no longer useful to the Canadian Forces. The court accepts that conviction for disobedience of a lawful command is not likely to assist you in your challenge to that release. If you are released in the near future you do not seem to be in a very good financial situation. The court would indicate that if you have a house and a mortgage that's not necessarily an unusual financial situation, but the evidence before it is that on top of that you owe about 25 or \$26,000. Depending on your release item, you may or may not get a severance pay of approximately 14 times \$1000; that is, \$14,000, and you may or may not receive UIC in a timely fashion. Your current gross pay, on the documents, is approximately \$3900 a month.

[10] It is clear that you can and have done reasonably well and the court accepts from the evidence that interestingly your area of strength seems to be in the administration field. The range for the offences of this nature, the range of sentence, is broad, but the court accepts that counsel has identified the appropriate range in this particular case which is from a severe reprimand or reprimand and a fine, down to a fine. The court has considered the cases that have been put before it of Sapper Wallace, which is a situation where there's a less serious conviction and he'd already been released, and Lieutenant-Commander Bowes, which the court would indicate in its view is a more serious case if for no other reason that Lieutenant-Commander Bowes is much more senior member of the Canadian Forces than you are.

[11] There are any number of other cases that the court could refer to but as it has indicated it is satisfied that this is the appropriate range to meet the requirements of

general deterrence. At the same time, the court feels that the disobedience of a lawful command is a serious matter and that requires at the very least a severe reprimand.

[12] So, Corporal Kemp, the court will sentence you and does sentence you to a severe reprimand and a fine in the amount of \$1000.

COLONEL K.S. CARTER, M.J.

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