

Citation:R. v. ex-Private R. Powers,2004CM13

Docket:S200413

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

Date:2 December 2004

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

HER MAJESTY THE QUEEN

v.

EX-PRIVATE R. POWERS

(Accused)

SENTENCE

(Rendered orally)

[1] Mr. Powers, this court has found you guilty of one offence contrary to section 85 of the *National Defence Act*.

[2] 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 heard in the course of the trial and the materials that have been made available to me in the course of the mitigation proceeding as well as the submissions of counsel, both for the prosecution and for the defence.

[3] 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.

[4] 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.

[5] 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 behaviour. 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.

[6] Section 139 of the *National Defence 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 may be further limited to the jurisdiction that may be exercised by the court. 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.

[7] In arriving at the sentence in this case, I have considered the direct and indirect consequences of the finding of guilt and the sentence that I am about to impose.

[8] The facts of this case may be briefly stated and are stated more fulsomely in my findings. Shortly put, in the course of an encounter in the junior ranks mess, the accused offered an insult to a superior officer being a Master Corporal Stanbury. Their exchange continued in the washroom of that facility in the course of which it appears that a shouting match developed and in the course of that process, the accused spat into the face of the master corporal.

[9] Both counsel recommend a disposition by way of fine in this case. In addition, the prosecution asks the court to consider a reprimand. I have decided that a reprimand is not suitable in this case. It is a peculiarly military punishment. The accused has now been released from the Canadian Forces. In my view, it is unlikely that a reprimand could be expected to have the same effect upon a former member of the Canadian

Forces as it would have on a continuing member and in my view, is not appropriate in this case.

[10] As I indicated, the accused has now left the Canadian Forces for civilian life. There is no strict analog between the offence charged in section 85 of the *National Defence Act* and anything under ordinary civilian law. The closest comparison I can come to is perhaps offering contemptuous behaviour to a court. But even in that instance, the contemptuous behaviour that is being punished is contempt towards the institution rather than the individual judge. In this case, your behaviour was contemptuous of Master Corporal Stanbury, and not only in his capacity as individual but especially in his capacity as a member of the Canadian Forces and of higher rank than yourself at the time of the offence.

[11] In a military context, this demonstration of contemptuous behaviour is objectively serious. Section 85 of the *National Defence Act* provides that the maximum punishment for this offence is dismissal with disgrace from Her Majesty's service. That punishment is very high in the scale of punishments and indicates that Parliament considers this offence to be objectively serious. In these circumstances, deterrence, as a principle of sentencing, assumes particular importance.

[12] The prosecutor has referred me to the disposition by way of sentence in the matter of *Ex-Private Sarmiento*. There are, of course, distinguishing features between the *Sarmiento* case and the case before me now. In that case, the accused faced a charge under section 85 of the *National Defence Act* and, in addition to that, a charge of absence without leave. The sentence in the *Sarmiento* case was a fine in the amount of \$700, but in that case, the court was particularly concerned with the absence without leave offence and less concerned with the section 85 offence that was before the court for sentencing, which the court described as one of the less serious instances of contemptuous behaviour under section 85.

[13] There is a parallel, nonetheless, between these two cases in that the accused, *Sarmiento*, and the accused before the court, were both ex-members of the Canadian Forces at the time they were sentenced. *Ex-Private Sarmiento* also had a conduct sheet disclosing a previous offence and so does Mr. Powers. In the course of his short career in the Canadian Forces beginning in September of 2001, he accumulated one charge of neglect to the prejudice of good order and discipline in failing to secure his locker containing military equipment for which he was fined \$600. A second offence involved absence without leave which was disposed of at the same time as the first neglect to the prejudice of good order and discipline and according to the conduct sheet, it attracted a sentence of seven days confinement to barracks.

[14] Lastly, in August of 2003, some three months prior to the offence that I have under consideration presently, he was found guilty at summary trial of an act to the

prejudice of good order and discipline, in that, he did use a prohibited drug while on leave the previous May for which he was sentenced to 21 days in detention.

[15] Detention also is a specifically and peculiarly military disposition. It is designed to reform the behaviour of the soldier so that following the service of the sentence, the soldier may be returned to the soldier's unit to fulfill a productive role having reformed his behaviour. It appears that the sentence of 21 days detention imposed in August of 2003 did not have the desired effect upon Mr. Powers.

[16] The accused is 24 years of age and married. He is presently unemployed having only recently been released from the Canadian Forces. I have been asked to consider, as a mitigating circumstance in this case, the delay which was made the subject of a pre-trial application before the court earlier this week. In my view, the periods involved in this case from the time of the offence until the time of trial were not excessively long. However, I am concerned with the failure of the unit to ensure the appointment of counsel on behalf of Mr. Powers at the time of the forwarding of the charges with a recommendation for court martial in April of this year. Queen's Regulations and Orders article 109.04, is entitled "Right to Legal Counsel". It reads:

(1) When an application is forwarded under article 109.03 (*Application to Referral Authority for disposal of a Charge*), the commanding officer of the accused shall cause the accused to be advised of the application and inquire of the accused whether he:

- (a) desires legal counsel to be appointed by the Director of Defence Counsel Services to represent him;
- (b) intends to retain legal counsel at his own expense; or
- (c) does not require legal counsel at this time.

[17] On the evidence before me, it appears that the unit has failed in its obligation under Queen's Regulations and Orders article 109.05 and there was a delay of some five months before the accused was afforded counsel. I consider this a serious factor which has reduced the sentence I would otherwise have imposed in this case.

[18] Taking into account the circumstances of the offence as well as the offender, I am satisfied that the principles of sentencing may be met by the imposition of a fine in this case.

[19] Stand up, Mr. Powers. You are sentenced to a fine in the amount of \$1000 payable in the following way: \$500 is to be paid forthwith, thereafter, you are to pay the amount of \$100 per month starting 15 Jan 2005 and continuing for the following four months.

[20] The proceedings of this court martial in respect of ex-Private Powers are hereby terminated.

COMMANDER P.J. LAMONT, M.J.

Counsel:

Major B.J. Wakeham, Director Military Prosecution

Counsel for Her Majesty the Queen

Major A. Appolloni, Directorate of Defence Counsel Services

Counsel for ex-Private R. Powers