



COURT MARTIAL

Citation: *R. v. Smith*, 2015 CM 1011

Date: 20150616

Docket: 201510

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

ex-Ordinary Seaman A.F. Smith, Offender

Before: Colonel M. Dutil, C.M.J.

REASONS FOR SENTENCE

(Orally)

[1] Ex-Ordinary Seaman Smith has admitted his guilt to four counts of being absent without leave, contrary to section 90 of the *National Defence Act*.

[2] The prosecution and defence have made a joint submission on sentence in order for the court to impose a fine in the amount of \$1500. Although the court is not bound by this joint submission, it can only reject it if the recommendation is contrary to the public interest and the sentence would bring the administration of justice into disrepute.

[3] The circumstances surrounding the commission of the offences are found at Exhibit 7, the Statement of Circumstances. It reads as follows:

At all material times, Ordinary Seaman Smith was a member of the Regular Force of the Canadian Armed Forces and a member of the Royal Canadian Navy assigned to the shore office of Her Majesty's Canadian Ship PROTECTEUR,

located at Canadian Forces Base Esquimalt, British Columbia. At all material times, the normal work routine, as set out in Routine Orders and instructed to the sailors assigned to HMCS PROTECTEUR's shore office, was that the work day commenced at 0750 daily and that all leave granted would expire at that time.

On 24 July 2014, shortly after 0800 hours, the chief engineer, Chief Petty Officer 2nd Class Penner, asked the supervisor of Ordinary Seaman Smith, Petty Officer 2nd Class Cameron, if he had seen Ordinary Seaman Smith at his place of duty that day. Petty Officer 2nd Class Cameron reported that he had not seen Ordinary Seaman Smith that day and was ordered by Chief Petty Officer 2nd Class Penner to take the ship's vehicle and two other sailors to drive to the residence of Ordinary Seaman Smith and bring him to the base. A computer search was made to determine the residence address of Ordinary Seaman Smith and it was discovered that the addresses recorded in Monitor Mass were out of date. Following enquiries made by Petty Officer 2nd Class Cameron, a residence address was obtained. Upon arrival at the apartment of Ordinary Seaman Smith, Petty Officer 2nd Class Cameron received no answer to knocks at the door. Petty Officer 2nd Class Cameron reported this lack of success to Chief Petty Officer 2nd Class Penner and was instructed to check the base hospital for Ordinary Seaman Smith. Ordinary Seaman Smith was not located.

At 1500 hours, the Executive Officer of HMCS PROTECTEUR's shore office, Lieutenant(N) Parise, used his issued BlackBerry to telephone Ordinary Seaman Smith. There was no answer. At 1522 hours, Lieutenant(N) Parise used his personal cell phone to call the same number, which was answered by Ordinary Seaman Smith. Lieutenant(N) Parise instructed Ordinary Seaman Smith to report to the unit by 1600 hours. Ordinary Seaman Smith reported that he had torn his ACL and had trouble walking. Lieutenant(N) Parise told Ordinary Seaman Smith again to report to the unit by 1600. Ordinary Seaman Smith finally reported to the shore office of HMCS PROTECTEUR at 1630 hours. Lieutenant(N) Parise observed Ordinary Seaman Smith climb the stairs with ease and noted no apparent difficulty or injury.

On 18 August 2014, Ordinary Seaman Smith again sent text messages to Leading Seaman Brown stating that he was going to the Medical Inspection Room (MIR). Leading Seaman Brown texted Ordinary Seaman Smith telling him to call Chief Petty Officer 2nd Class Penner as Chief Petty Officer 2nd Class Penner was angry. Ordinary Seaman Smith did not make that call. After numerous text messages between Leading Seaman Brown and Ordinary Seaman Smith, Ordinary Seaman Smith stated that he would report to the shore office at 1023 hours. Ordinary Seaman Smith finally arrived at the shore office at 1100 hours and admitted to Chief Petty Officer 2nd Class Penner that he did not go to the MIR, but decided to go to work late that day.

On 28 August 2014, Ordinary Seaman Smith again sent a text message to Leading Seaman Donaldson at 0730 hours, only one day after being ordered again to

contact Chief Petty Officer 2nd Class Penner. In that text, Ordinary Seaman Smith said he would be one hour late for work. The day before, Ordinary Seaman Smith had informed his commanders that he now had arranged for his aunt to babysit and that his childcare issues were at an end. Ordinary Seaman Smith told Leading Seaman Donaldson that his aunt had to take his grandmother to the hospital and that Ordinary Seaman Smith had to stay with his daughter. As the day wore on without Ordinary Seaman Smith reporting for duty, Chief Petty Officer 2nd Class Penner dispatched Petty Officer 2nd Class Cameron and Leading Seaman Donaldson to find Ordinary Seaman Smith. When they arrived at Ordinary Seaman Smith's apartment, they were informed that he had been evicted for not paying rent. Ordinary Seaman Smith had not reported any change of address to his unit. Through further text messages, Leading Seaman Donaldson obtained the address of Ordinary Seaman Smith's mother along with the information that Ordinary Seaman Smith was then residing at that address. Petty Officer 2nd Class Cameron met with Ordinary Seaman Smith at that home at 1600 hours and informed Ordinary Seaman Smith that he was AWOL and would remain so until he reported for work at the shore office on 2 September 2014. Ordinary Seaman Smith told Petty Officer 2nd Class Cameron he had made suitable arrangements for childcare and that there would be no reason he would be unable to arrive at work on time on 2 September after the long weekend.

On 2 September 2014, Ordinary Seaman Smith again did not report for duty at 0750. Leading Seaman Donaldson received a text message at 0659 hours from Ordinary Seaman Smith wherein Ordinary Seaman Smith stated he did not have day care for his child. Leading Seaman Donaldson was told by Chief Petty Officer 2nd Class Penner to relay a message to Ordinary Seaman Smith that he was absent without authority again and that he must immediately report in person to the shore office. Ordinary Seaman Smith texted back that "I'm four days adrift anyway, so who cares." There was no further contact from Ordinary Seaman Smith until he reported to the shore office, unshaven and in civilian clothes, at 1400 hours. Ordinary Seaman Smith had been told by Chief Petty Officer 2nd Class Penner on numerous occasions that he was to report for duty on time, shaven and in uniform.

On 16 October 2014, Ordinary Seaman Smith was charged with being absent without authority on 24 July 2014. He was offered an election to be tried at summary trial or before a court martial. On 22 October 2014, Ordinary Seaman Smith elected to be tried by court martial.

On 24 October 2014, Ordinary Seaman Smith was charged with being absent without authority on 15 August 2014 and on 18 August 2014. He was offered an election to be tried at summary trial or before a court martial. On 28 October 2014, Ordinary Seaman Smith elected to be tried by court martial.

On 30 October 2014, Ordinary Seaman Smith was charged with being absent without authority on 26 August 2014, 28 August 2014 and 2 September 2014.

He was offered an election to be tried at summary trial or before a court martial. On 31 October 2014, Ordinary Seaman Smith elected to be tried by court martial.

On 12 December 2014, all the above charges were referred by Commander Elbourne, Commanding Officer of HMCS PROTECTEUR to Rear-Admiral Truelove, Commander Maritime Forces Pacific as the referral authority. Rear-Admiral Truelove referred the charges to the Director of Military Prosecutions by letter dated 15 December 2014. The charges were preferred by a charge sheet, dated 5 February 2015.

Ordinary Seaman Smith was subsequently released from the Royal Canadian Navy and is now a civilian. He has a daughter aged five.

[4] The fundamental purpose of sentencing at courts martial is to contribute to the respect of the law and the maintenance of military discipline by imposing punishments that meet one or more of the following objectives:

- (a) the protection of the public, including the Canadian Forces;
- (b) the denunciation of the unlawful conduct;
- (c) the deterrent effect of the punishment, not only on the offender, but also upon others who might be tempted to commit such offences; and
- (d) the reformation and rehabilitation of the offender.

[5] The sentence must also take into consideration the following principles:

- (a) it must be commensurate with the gravity of the offence, the previous character of the offender and his or her degree of responsibility;
- (b) the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; and
- (c) the court must also respect the principle that an offender should not be deprived of liberty if less restrictive punishments may be appropriate in the circumstances. However, the court must act with restraint in determining sentence and imposing such punishment or punishments that constitute the minimum necessary intervention to maintain discipline.

[6] The predominant objectives of sentencing here are general deterrence, denunciation of the conduct and rehabilitation.

[7] The aggravating factors present in this case relate to frequency of the absences and the burden imposed on the chain of command to locate the offender when he did

not report for work. In addition the offender has had an extensive conduct sheet for similar offences within a very short period of five years as a member of the Navy.

[8] However, there are important mitigating factors:

- (a) a plea of guilty by the offender at the earliest opportunity. In the circumstances of this case, I accept these pleas as a full expression of remorse and an acceptance of responsibility;
- (b) the personal situation of the offender as described before the court. In recent years he has experienced significant mental health issues and addiction issues that led to his release under item 5(b). He has now taken steps to start a new life, including moving to a new location with his girlfriend in British Columbia. He has been sober for the past seven weeks and he is currently continuing with his treatment, such as attending AA meetings regularly; and
- (c) he is also the father of a five-year-old girl, who will likely reside with him and his girlfriend soon. This situation is positive for his family and should assist in his rehabilitation.

[9] The court accepts that the proposed sentence is the minimal sentence in the circumstances to achieve general deterrence, denunciation of the conduct and rehabilitation. It is not contrary to public interest and it would not bring the administration of military justice into disrepute.

FOR THESE REASONS, THE COURT:

[10] **FINDS** you guilty of the first, third, fifth and six charges of absence without leave contrary to section 90 of the *National Defence Act*.

[11] **SENTENCES** you to a fine in the amount of \$1500, payable in six equal monthly instalments, starting 23 June 2015, by certified cheque or money order to the Receiver General of Canada. The payments shall be forwarded to the address provided by the Director of Military Prosecutions.

Counsel:

The Director of Military Prosecutions, as represented by Major R.J. Rooney

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for ex-Ordinary Seaman A.F. Smith