



COURT MARTIAL

Citation: *R. v. Nielsen*, 2003 CM 080

Date: 20030325

Docket: S200308

Standing Court Martial

Lecture Training Facility, Edmonton Garrison
Edmonton, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Private C.K. Nielsen, Offender

Before: Commander C.J. Price, M.J.

SENTENCE

(Orally)

[1] Private Nielsen, having accepted and recorded your plea of guilty to charge number one, the court now finds you guilty of that offence.

[2] The defence and prosecution jointly submit that the appropriate sentence here is a 15-day term of detention, to be suspended, and a \$1500 fine. The jurisprudence of joint sentencing submissions is to the effect, that unless the recommendation is contrary to the administration of justice or otherwise not in the public interest; that is to say, clearly unfit, that recommendation should not be ignored by the sentencing court. I will say at the outset I will accept the joint submission, but I do so with some reluctance.

[3] I say this because of the nature of the offence here. AWOL, absence without authority, is a very serious matter in the military and convictions for significant absences usually result in a serious punishment. Certainly, for a 30 day period of absence, a custodial sentence would usually be the norm. The reasons for this are

obvious, if Canadian Forces members feel they can leave whenever they choose, there would obviously be no insurance of discipline or efficiency or readiness.

[4] The principles of sentencing are well known: they relate to the protection of the public, and public, of course, includes the Canadian Forces; and secondly, there is the punishment of the offender; thirdly, the deterrent effect of the punishment, not only on the offender which is, of course, specific deterrence, but also on general deterrence; that is to say, others who might be tempted to commit similar offences; and lastly, but certainly not least, there is the reformation and rehabilitation of the offender. The prime principle of sentencing is the protection of the public, and in the case of offences under the Code of Service Discipline, the maintenance of discipline. And the court must determine if that protection and maintenance of discipline would best be served by deterrence, rehabilitation, punishment, or a combination of those factors.

[5] The sentence imposed in this case, I believe, should reflect the principles of general deterrence and rehabilitation. I would also say the court has also given consideration to the factors of proportionality of the sentence in relation to the offender and the accountability of the offender for his actions. While the accused should be accountable for his actions, the sentence shall not, on the other hand, be disproportionate in relation to the offence. Now, I have said that AWOL is a serious offence, but I would also say that incarceration is not necessarily an automatic result for a conviction for this offence. The court's responsibility is to weigh both the circumstances of the offence and of the offender, and impose a just and fit sentence, after considering, as I say, the circumstances of both offender and offence.

[6] The circumstances of the offender, here, merit some consideration. Mr Block, an experienced registered psychologist with an impressive résumé, conducted an extensive mental health assessment of Private Nielsen and testified, at some length, as to his conclusions in that regard. His report, which I find to be both objective and honest, provides the following summation, and I am reading, now, from page 11 of that report. It says, and I am quoting:

“Private Nielsen is experiencing a multitude of emotional and psychological problems resulting in a *moderate level* of psychopathology. Early unmet dependency needs and maternal deprivation resulted in an ambiguous start in life. Living with his father resulted in minimal emotional contact or stimulation. Conditions were typically strict and somewhat oppressive. Alcohol abuse, interpersonal distress, self-deprecatory and inadequate self-esteem and inability to cope with increasingly high levels of psychosocial stress has reduced this man to his current state of helplessness and anguish.

There is evidence to suggest the presence of a prominent anxiety disorder in this man. Widely generalized symptoms are consistent with his overall personality makeup: pervasive social disquiet, behavioural edginess, apprehensiveness over small matters, and worrisome self-

doubts, the most frequent of which may relate to masculine inadequacy. He is especially edgy to public reproof, experiencing more discomfort than usual with higher levels of resentment threatening to break through.

Chronic low-grade depression has afflicted Private Nielsen over the years. This appears to have resulted in patterns of self-defeating behaviours, emotional lability, identity diffusion, and fears of being alone. He has trouble with self-acceptance, often feeling unworthy, unlikable, and inadequate. At times he may be aware of these states but is more apt to be oblivious by disowning these negative states. This is often achieved by blaming others for his problems.”

[7] Mr Block, in his conclusions, goes on to say, and I am quoting now from page
12:

“In regards to this AWOL behaviour, Private Nielsen appeared to have acted out of impulse, fuelled by a deep-seated resentment and fear of authorities. His insecurities and fears dissuaded him from facing the problems, instead resulting in evasive action. He has a moderate level of psychopathology that underlies his irrational actions.

This young man could be facing a period of confinement in detention barracks, as a result of the accusation of AWOL. During this protracted time awaiting the court marshal [sic] process, he has been struggling with his issues, ruminating unproductively, and self-punishing. He fears that if placed in DB, he will not be able to cope, leading to a mental breakdown. The mere thought of isolation and being cut off from his only supports is enough to restimulate all the fears that initially prompted his evasive actions.

Disciplinary measures are not apt to change this man's attitude for the better and only serve to confirm and intensify the negative impressions he has of the military. Without an adequate intervention, this man is not apt to appreciate the gravity or meaning of his actions. Punishment will likely serve to further alienate him, confirm his fears, and justify his behaviours. He has underlying emotional problems that require therapeutic attention in order to prevent behaviour like this from occurring in the future. This "opportunity" also could help him restore faith in himself and improve his chances of being a productive member of society.”

[8] Now, I also observe, that while Private Nielsen does have a previous conviction for AWOL, that absence, which he says was a mistake, was the triggering event for the longer absence forming the subject matter of the current charge before the court. This three day absence, for which he was earlier found guilty at a summary trial, is, in my view, linked to the longer absence. It really was all part and parcel of a larger episode.

As Mr Block says, Private Nielsen, because of underlying psychological problems, tends to literally run away from his problems. When I consider and balance all of these factors, and in light of Mr Block's report, I am convinced a custodial sentence, at this time, would impede Private Nielsen's rehabilitation. I am also of the view that general deterrence must not be lost sight of, but general deterrence must not be emphasized to the exclusion of the circumstances of the offence and the particular circumstances of the accused.

[9] I am, therefore, as I have said, in these unusual circumstances, prepared to accept the joint sentence recommendation. The sentence, however, that I am imposing today should not be taken as a precedent or is, in any way, a diminution of the seriousness of the offence of AWOL. Let me lastly say, Private Nielsen, you had better have a long talk with yourself. You are probably at a turning point in your life, at this stage. I agree with you, a career in the military is not for you. However, you have a child and a wife you must take care of and you cannot take care of them unless you take care of yourself. You are being given a chance here. You are very lucky to be walking out the door today and you had better deal with your anger and the underlying issues you have because you, in the future, if you commit further offences, you are not going to find the kind of leniency you have found here. So this is one chance you are being given here.

[10] Private Nielsen, the court sentences you to a period of detention for 15 days, the detention will be suspended. The court further sentences you to a fine of \$1500 repayable at a rate of \$100 a month beginning the 1st day of April, 2003. If you are released from the Canadian Forces the balance of the fine remaining at that time shall be paid the day before the date of your effective release from the Canadian Forces.

Counsel:

Major B.J. Wakeham, Regional Military Prosecutions Western
Counsel for Her Majesty the Queen

Major D. Antonyshyn, Directorate of Defence Counsel Services
Counsel for Private C.K. Nielsen