Citation: *R. v. ex-Chief Petty Officer 2nd Class G.A. Tobin,* 2005CM01

Docket: S200501

STANDING COURT MARTIAL
CANADA
NOVA SCOTIA
CANADIAN FORCES BASE HALIFAX

Date: 9 September 2005

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

HER MAJESTY THE QUEEN
v.
EX-CHIEF PETTY OFFICER 2ND CLASS G.A. TOBIN
(Accused)

SENTENCE
(Rendered orally)

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[1] Ex-Chief Petty Officer 2nd Class Tobin, it is usual that the court requires that the offender be standing while the sentence is imposed, however, in your particular case, given your medical difficulties, and the fact that the court is going to spend some time explaining its reasoning, the court will allow you to sit until such time as it actually imposes the sentence.

[2] Having accepted and recorded a plea of guilty, the court now finds you guilty of charge No. 4 on the charge sheet, with the amended particulars reading, "from the 7th of December, 2001, until the 31st of May, 2002."

[3] The starting point for this sentence is that ex-Chief Petty Officer 2nd Class Tobin has been convicted of one offence, a breach of trust under section 122 of the *Criminal Code of Canada,* which occurred over approximately a five-month period in 2002, three years ago.

[4] In making its decision, the court has considered the Statement of Circumstances, the testimony of Chief Petty Officers 1st Class Pratt and Doucette, the testimony of the offender himself, and the documents filed in Exhibits 19 to 25. The court, in determining an appropriate sentence in this case, has considered a number of

things including: the general principles of sentencing, and these are found in cases, both civilian and military, which deal with offences and/or circumstances of a similar or apparently similar nature; the nature of the offence to which you've pled guilty and been found guilty; your previous character; the mitigating and aggravating factors disclosed; the Statement of Particulars; the documentary evidence introduced; the testimony of witnesses; and the submissions of both of the counsel.

[5] The fundamental purpose of sentencing is to enhance the protection of society. The protection of society is achieved if the imposition of legal sanctions serves to deter both the convicted offender from re-offending, and those who have yet to offend from doing so at all. A just sentence promotes respect for the law which enhances the protection of society. A sentence must be neither too harsh; that is, based on vengeance, nor too lenient; that is, based on misplaced sympathy. The general principles of sentencing applied by both courts martial and civilian criminal courts in Canada are founded on this fundamental purpose; that is, to protect the public, and that public includes the Canadian Forces and individual members of that institution.

[6] The protection is from unlawful conduct and its consequences. The general principles that are used to achieve this include: the principle of deterrence, specific deterrence, which is to deter the individual, and general deterrence, which is to deter others in similar circumstances who might be considering similar actions; the principle of denunciation, which is an expression of society's rejection of the conduct; and thirdly, the principle of reformation and rehabilitation of the offender, which may occur within military society or within Canadian society generally.

[7] In addition, another underlying principle is that of proportionality. A sentence must be proportionate to the offence and the degree of responsibility of the offender. This requires that the sentence is appropriate, not only to the nature of the offence, but also to the moral blameworthiness, the character of the offender, the circumstances that it was committed in, and the consequences of its commission. A judge must also take into account the mitigating factors, which are things such as guilty pleas, restitution, and an offence being a first offence, as well as aggravating factors, which include things such as premeditation and the amount of any deprivation. And finally, a judge must not impose a sentence which is disproportionate given sentences imposed on similar offenders in similar circumstances.

[8] A court martial is also required, in imposing a sentence, to follow the directions set out in QR&O 112.48, which obliges it, in determining the sentence, to take into account any indirect consequences of the finding or of the sentence, and impose a sentence commensurate with the gravity of the offence and the previous character of the offender. Both civilian and military law require that the offence be punished by the minimum punishment necessary to achieve these aims.

[9] The court has also considered the guidance of the purposes of sentencing set out in section 718 of the *Criminal Code of Canada*. Those purposes are to denounce unlawful conduct, to deter the offender and other persons from committing offences, to separate the offender from society when necessary, to assist in rehabilitating offenders, to provide reparation for harm done to victims or to the community, and to promote a sense of responsibility in offenders and an acknowledgement of the harm done to victims and the community. These principles are very similar to the ones that are found in the *National Defence Act* and Queen's Regulations and Orders.

[10] The court is also cognizant of the direction of the Supreme Court of Canada in the 1998 case of *R. v. Gladue,,* found at 133 C.C.C. (3d) 385, where, at page 402, it states imprisonment should be used as a sanction of last resort. The court also takes into account that the ultimate aim of sentencing is the restoration of discipline in the offender, if the offender is still a member of the Canadian Forces, but even if the offender is not still a member of the Canadian Forces, in military society generally. Discipline is that quality that every Canadian Forces member must have which allows him or her to put the interests of the Canadian Forces, the interests of Canada, before their personal interests. Discipline requires trust, both up and down, to superiors and to subordinates, and that trust requires that every member of the Canadian Forces trusts the other members will not put their personal interests before the interests of the Forces.

[11] So those, then, are the general considerations that this court must take into account in determining what an appropriate sentence is in this case; that is, what will properly reflect the gravity of the offence, protect the public, re-establish respect for law and discipline, and take into account, not only the gravity, but the circumstances of the commission of the offence, your previous character, your current situation, and what is the minimum necessary to restore discipline?

[12] The prosecution has submitted that the principle goal of sentencing in a breach of trust case should be general deterrence. The prosecutor stated there is a wide range of sentences, though he could only find civilian cases, and the sentences there range from absolute discharge to imprisonment, depending on the circumstances. The prosecution identified the mitigating factors in this case as this being a first offence by you, that you have had 25 years of service, that there was a plea of guilty, and that you are in a difficult current medical situation. The aggravating factors were identified by him as this being a deliberate and reasonably sophisticated scheme using deception, and that you used your knowledge as a senior Supply Technician to your personal advantage.

[13] The prosecution has submitted that this is a case where imprisonment is warranted, specifically 34 days of imprisonment. However, the prosecution went on to urge the court to treat your custody during this court martial, of 17 days, as, essentially, an offset, on the basis of one day of each pre-conviction day of custody as the equivalent

of two days served post-conviction. Originally, the court understood that the proposal of the prosecution was that you should be sentenced to zero days of imprisonment; essentially, a non-sentence. But this was clarified to 34 days, but no custody order being signed, which the prosecution submits this court has the power to do under section 179 of the *National Defence Act.* Alternatively, and subsequently, the prosecution agreed to the defence submission that 30 days' imprisonment, suspended, would achieve the same result.

[14] The submissions of your defence counsel were that there were a number of mitigating factors in this case. He stressed it was a first offence, that you had provided good service to the Canadian Forces as outlined in the testimony of Chief Petty Officers 1st Class Pratt and Doucette, who testified about your service from 1997 to 2001. He emphasized your current psychological problems and medical difficulties, and the fact that you had difficult financial circumstances at this particular time. He stressed your plan to upgrade your education would be facilitated by returning you to studies as soon as possible. Your counsel mentioned your guilty plea, and also the fact that there is no evidence before the court that the Canadian Forces did not receive the items ordered from DA Imports; that is, his argument was, that although you received a personal benefit, it does not appear that the Canadian Forces suffered a consequential loss. In addition, the personal benefit was identified as being in the range of $2500, not $20,000.

[15] Your defence counsel submitted that the appropriate sentence would be also imprisonment, 34 days, but if the court did not accept that time in custody could be offset, then your counsel recommended 30 days' imprisonment, suspended. There was some reference to the case of a *Warrant Officer Gallagher*, which, the court would indicate, it considers a much more serious case, and a reference to a sentence there of four months. In fact, the sentence there was two months' imprisonment and reduction in rank to the rank of private.

[16] The court would indicate it has some difficulties with these submissions. And the first difficulty is there is no sentence of suspended imprisonment. There is only a sentence of imprisonment; imprisonment for less than two years for a Standing Court Martial, or up to life imprisonment for a General Court Martial. In certain cases, having established that imprisonment is an appropriate sentence, suspension may be warranted. And there are various reasons for suspension being substantiated and granted, things such as: personal illness, somebody who is in a last stages of terminal illness; family situation, where somebody is the sole support of a very vulnerable individual; or, in certain cases, if rehabilitation would be seriously retarded if imprisonment were served.

[17] To the court's knowledge, there is no sentence of time served, per se. There is a consideration, and it is not binding, that pre-trial custody can, and often is offset against any sentence of imprisonment that may be imposed. And this is often

done at the rate of two days post-trial custody credit for every day of pre-trial. That is not always the case, and it will depend on the circumstances. The court would add here, that if you had been convicted of fraud, then certainly the court in this case would be looking at a sentence which would involve imprisonment to be served at the Canadian Forces Service Prison and Detention Barracks in Edmonton. And that, even if the court was prepared to give some credit for time served, that it would still involve additional time to be served at Edmonton. Also, the court would indicate, that on the information it has received, suspension has not been substantiated.

[18] However, you have not been convicted of fraud. You have been convicted of one offence of breach of trust. And what is the most important issue here is whether or not imprisonment is warranted in this case. I take the joint submission to be that 34 days of imprisonment is warranted as a punishment for this offence, committed by you, in these circumstances. That is the starting point. The rest of the submission flows from there only if that fact is accepted. Concurrently, but only consequentially, counsel submit that no actual imprisonment should be served by you, whether because the court has been convinced that credit should be given at the rate of two days post-conviction custody for every one day of custody during this court martial, and the court has the power to declare you have already served the time, and under section 179 of the *National Defence Act* it can make that declaration and not sign a custody order, thereby not allowing the sentence to be carried into effect, or because the court has been convinced there are good reasons that it should suspend the carrying out of the imprisonment.

[19] While the court is not entirely clear why 34 days is the appropriate period of imprisonment suggested, other than it appears to be 2 times 17 days , the court accepts the submission is sincere. It is less the length than the nature of the punishment which causes the court concern. A joint submission on sentencing, however, is a matter which a court must consider seriously. In that regard, the Court Martial Appeal Court, in *R. v. Paquette*,, a 1998 decision, No. 418, at page 7, made that clear. And I would quote from paragraph 19:

> The President's comments indicate that he was aware that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or unless the sentence is otherwise not in the public interest ...

[20] In the case of *R. v. Dubuc*, D-u-b-u-c, 131 C.C.C. (3d) 250, the Quebec Court of Appeal, in its decision rendered by Fish J.A., as he then was, made a number of statements which relate to joint submissions. First, Fish J.A. says:

> This plea agreement was the fruit of serious discussion by experienced counsel on both sides.

He goes on to quote from the case of *R. v. Wood,* which is a 1998 decision of the Ontario Court of Appeal. And at page 2 of the *Dubuc* decision, Fish J.A. states that, in the quote from *R. v. Wood* :

> "It is trite law that the court always retains an overriding discretion to accept or reject any recommendations of counsel with respect to the quantum of sentence, even where a joint submission is made by experienced counsel ...

and it continues:

> ... But it is also clear that serious consideration should be given by the court to recommendations of Crown counsel, particularly where the facts outlined, following a guilty plea, are sparse. The Court then has to recognize that Crown counsel is more familiar than itself with the extenuating or aggravating circumstances of the offence which may not be fully disclosed in the summary of facts ....

[21] Often, a joint submission, for a variety of reasons, particularly if a guilty plea to some or all of the offences is contingent on a submission on sentencing which will often be at the lower end of the appropriate range, though the court would indicate that does not appear to be the case here, or it will be a situation where the prosecution has made certain decisions based on evidentiary or public interest criteria which it must apply, and which, unless the court is advised, will not be evident in the more usual considerations of aggravating and mitigating factors.

[22] There is certainly a role for resolution of cases by agreement between the prosecution, representing the interests of the public, and in particular the Canadian Forces, and defence counsel, representing the interests of the accused person. However, as the law has stated, a court is not bound by either an agreement as to plea or sentence, but a court will be respectful of them. That respect, however, is contingent on the agreed submission not bringing the administration of justice into disrepute, nor being otherwise contrary to public interest. The court is not bound in law by such a submission, but may find that it is, in fact, bound by the logic of the submission.

[23] The court's concern in this case is a little different than usual because the concern is that the starting point; that is, more than 30 days' imprisonment, is so high that, in fact, to accept it would not be in the public interest. Alternatively, if the court considered the joint submission actually made is that the offender should not be punished for the offence, and imprisonment has been submitted only because it could be offset or suspended, then the court would find that accepting such a submission would bring the administration of justice into disrepute. As you can see, the court does not find itself bound by the logic of the submission in this case.

[24] Before taking the next appropriate step which the court should follow when it finds it is unable to accept a joint submission, I want to first outline for counsel what the court has considered in sentencing, and what sentence the court is considering.

In this case, the offender, ex-Chief Petty Officer 2nd Class Tobin, has been convicted of one offence of breach of trust, which objectively is a less serious offence than fraud or stealing or stealing while entrusted. The Canadian Forces received all the materials ordered, and at fair value. The accused benefitted, but as I've already indicated, not at the expense of the Canadian Forces or the Department of National Defence.

[25] The offence was, however, a continual offence occurring over a period of five months, and was a deceitful scheme. These incidents occurred more than three years ago. Indeed, even if this court martial had proceeded in the January 2005 time frame, some of the offence would already have been more than three years old at that time. The offender served for more than 25 years in the Canadian Forces. All his time since his basic qualification training in 1979 in postings to Nova Scotia, and 18 of those years with the air element, as set out in Exhibit 21.

[26] The two witnesses, the Chief Petty Officers 1st Class, who testified were very satisfied with his performance as their supplier. Originally from Newfoundland, the offender returned there after his release in 2004. Since completing high school in 1978, he has finished a number of military trade courses, and two professional development courses; Defence Organization and Establishment in 2000, and Introduction to Defence Management in 2002. Since his release, he has been taking advantage of medical rehabilitation benefits to complete five courses towards a certificate of business administration at Memorial University, and is hopeful he will be registered in a Master's programme in January 2006.

[27] Ex-Chief Petty Officer 2nd Class Tobin's physical and psychological health has declined over the past three years, and currently he suffers from degenerative back problems and psychological problems. These psychological problems consist of depression and, apparently, Post Traumatic Stress Disorder, though there is no evidence before the court as to the origins of the Post Traumatic Stress Disorder, which may or may not have a relation to the military. He is receiving treatment at this time for all of these problems.

[28] He is married and his wife is employed. They have approximately $15,000 of equity in their house. Ex-Chief Petty Officer 2nd Class Tobin, until next May, will receive approximately $50,000, which is—a year—which is 75 per cent of his pre-retirement income. After that time, his take home income from pension sources will decline to approximately $2450 a month. Due to an investment in a concert which did not occur, ex-Chief Petty Officer 2nd Class Tobin has incurred significant debts, but he is hopeful that he will rectify this situation through successful investment in upcoming concerts later this year.

[29] The court accepts that general deterrence in a breach of trust offence is the most important principle in sentencing. It finds, here, the mitigating factors are: that

it is a first offence; that there are many previous years of service to benefit of the Canadian Forces by the offender; that a guilty plea, at whatever stage, is an acceptance of responsibility; that ex-Chief Petty Officer 2nd Class Tobin has publicly expressed his acknowledgement of the wrongfulness of his actions and his remorse for those actions; that there is no evidence of actual deprivation to the Canadian Forces and the Department of National Defence; that it has been a significant length of time since these offences occurred; and also, that , currently, ex-Chief Petty Officer 2nd Class Tobin is suffering from both physical and psychological ailments.

[30] In terms of aggravating factors, the court has considered that this offence was planned, deliberate, and continuing. An issue was raised that the scheme involved using people who obviously trusted and respected ex-Chief Petty Officer 2nd Class Tobin. The court would indicate it has not considered that an aggravating factor for the purposes of this sentence.

[31] Because the range in civilian cases is so broad; that is, from one end of the spectrum to the other, the court has looked to courts martial of similar, if more objectively serious offences such as fraud and stealing, to narrow the appropriate range to be considered for an offence of this nature. The first court martial that has been considered is that of *R. v. Vanier*, a 1999 Court Martial Appeal Court judgement dated the 4th of February, 1999. Lieutenant-Colonel Vanier had been convicted of six fraud related charges occurring during the period July to October 1996, and the amount of the fraud was calculated to be approximately $13,000, though at paragraph 7 of the judgement, the Court Martial Appeal Court indicated that the court martial found that in relation to defrauding the Crown, Lieutenant-Colonel Vanier had defrauded the Crown of no more than he would have been entitled to if he had done his claims properly. He was sentenced to reduction in rank and a $10,000 fine.

[32] In the case of *R. v. Legaarden*, another 1999 decision of the Court Martial Appeal Court, Commander Legaarden had ben found guilty of a series of fraudulent acts and sentenced to a period of six months' imprisonment, which he appealed. The Court Martial Appeal Court accepted there would be full restitution in the case, that the amount of money involved was $2400 in US funds, and they imposed upon him a severe reprimand and a $10,000 fine.

[33] In the case of *R. v. Levesque*, a 1999 decision of a Standing Court Martial, Master Corporal Levesque pleaded guilty to conspiracy, mischief, and an act of a fraudulent nature, and these all related to a scheme to defraud insurers by claiming damage to furniture during a moving claim. The Standing Court Martial sentenced him to a severe reprimand and a $4,000 fine. The Court Martial Appeal Court found that the sentence was not unreasonable given that no money had actually been defrauded and the amount of $35,615.42 claimed was not actually paid out. This was a guilty plea, and, again, was Master Corporal Levesque's first offence.

[34] In the case of *R. v. Deg*, which is a Court Martial Appeal Court judgement from 1999, Court Martial Appeal Court No. 427, Lieutenant(N) Deg had pled guilty to stealing while entrusted and 24 associated charges. The Court Martial Appeal Court considered that the amount involved, ultimately, was $619, and he was convicted, as I've indicated, to stealing while entrusted, but sentenced by the Court Martial Appeal Court, who reduced his sentence at court martial, to a $5,000 fine and a severe reprimand.

[35] The case of *R. v. St. Jean* has already been mentioned. Sergeant St Jean pled guilty to a fraud in the amount of $30,835.05. This fraud was conducted over a six-month period and involved creating false General Allowance Claims. In the Court Martial Appeal Court decision he was found he was a first offender, and had 26 years of unblemished service. Only $450 had been repaid at the time of the CMAC decision. The Court Martial Appeal Court reduced Sergeant St Jean to the rank of corporal and sentenced him to an $8,000 fine.

[36] The case of *R. v. Lechmann*, a 2001 Court Martial Appeal Court case, was one which, again, resulted in a fine and a suspended sentence. And I will also mention the case of *Sergeant Bernard*, a 1999 court martial, where Sergeant Bernard was convicted of stealing while entrusted and making false entries in regard to an amount of $2,000. There, the punishment was reduction to the rank of corporal and a $2,000 fine.

[37] There was also the court martial of *Master Corporal Bouchard* in 2001. This was a guilty plea to four charges relating to the fraudulent production of a series of cheques which Master Corporal Bouchard subsequently cashed. The total amount involved was approximately $14,000. Most of the offences occurred within a one month period, it was a first offence, he was in a position of trust, and there was a significant length of time that had passes since the offences were committed. He was sentenced to a severe reprimand and a $4,000 fine.

[38] While imprisonment is not prohibited, and therefore not beyond the range for a breach of trust, the court is of the view that the range , being so large, has to be narrowed down. And in this particular case it has looked at analogous court martial sentences to find an appropriate range. That range, from the court's perspective, for an offence of this nature would be reduction in rank, severe reprimand, and a fine. The court finds that a fine is particularly useful in serving general deterrence where the nature of the offence includes personal financial benefit, which is the case here. Consequently, the court is looking at a sentence within that range. Given the delay in this matter, given the limited risk of re-offending, since ex-Chief Petty Officer 2nd Class Tobin is no longer a member of the Forces, given that there is no evidence of deprivation, given, further, that ex-Chief Petty Officer 2nd Class Tobin, having pled guilty and been found guilty of a breach of trust offence, will have as a consequence a

criminal record, which may well make it very difficult for him if he ever wants to serve in a position where he has to be bonded, the court accepts that reduction in rank is not required. The court, rather, is looking at an offence—looking at a sentence for this offence of a severe reprimand and a fine in the amount of $3,000, which is the minimum that the court believes will serve general deterrence while recognizing the unique circumstances here.

[39] The appropriate process when rejecting a joint submission is to explain the problems that the court sees with the joint submission, indicate to counsel the sentence the court is considering, and why, and to give counsel the opportunity to make any additional submissions, if they wish, to address the issues raised. I am, therefore, going to adjourn for 15 minutes to permit counsel to decide if they have any submissions to make, and to prepare those submissions. So the court is now adjourned for 15 minutes.

THE COURT HEARS FURTHER SUBMISSIONS FROM COUNSEL.

[40] The court has considered the further submissions of counsel. The prosecution, in particular, submitted that the court should have, and failed to consider evidence in the main trial. Specifically, he referred to the testimony of Ms St Onge re a inferred deprivation to the Department of National Defence, also the testimony of purchasers in regard to their being deceived by ex-Chief Petty Officer 2nd Class Tobin, and finally, the submission of the defence was that the court misapplied any considerations regarding delay in bringing this matter to trial.

[41] The prosecution's submission was that, if these considerations were properly taken into account and applied, then more than 30 days' imprisonment was an appropriate punishment for this offence. Much of what the prosecution relied on was described as inference or reasonable inference, rather than simply fact. And as I have indicated, it was the prosecutions submission that, if properly considered, then 34 days of imprisonment at Canadian Forces Service Prison and Detention Barracks in Edmonton would be the appropriate punishment for this offence.

[42] To the extent that the testimony is relevant to this charge and consistent with the Statement of Circumstances, the court has reviewed that testimony—and the court would indicate that all the testimony it reviewed was consistent with the Statement of Circumstances—the court could not find any inconsistencies. For example, Exhibit 17 laid out 11 transactions and a total amount of $19,635.24. The court does not consider that the 24 cents being left off the Statement of Circumstances is a discrepancy.

[43] The first issue is the issue of the deprivation of the Canadian Forces of the profit that Mr Tobin, by inference, made from his activities as set out in charge No. 4. The fact that he made a profit; that is, that he received a benefit, is, of course, an

essential element of the breach of trust itself. The court is prepared to accept that, reasonably, it could infer that that was in the range of $2,000 to $2500. The question is whether or not this is also, by inference, a deprivation to DND. Clearly, that inference could be drawn if the goods provided cost more than, for example, those that were set out in other bids. Or, alternatively, there could be a deprivation if the duty on CF members, for example purchasers, was not to go to suppliers themselves, but to go to the suppliers of suppliers to get bids. And an example of this would be that it would be insufficient for the purchaser to go to an organization such as J.M. Murphy or Big Eric, which was mentioned, to obtain a quote, because, clearly, these organizations get their material from some other organization. Rather, the obligation would be to go to their suppliers and get the quote.

[44] The court does not find that there is any evidence that that's an obligation, and that there's been a breach of that obligation. Therefore, the court doesn't find that there's been any deprivation established. In relation to bids under $1,000, it is clear that these require only one bid. There, the only evidence that the court has to rely on is the evaluation as expressed by the purchasers in their testimony, and the evidence that they put forward was that that was a fair price, which is confirmed in the Statement of Circumstances. There was one exception in the testimony, but that related, not to DA Imports, but rather to the other company, A2Z, and an issue of coffee and the substantiation of the value of a brand of coffee.

[45] So the court is not satisfied that the deprivation has been established. And it would also point out that deprivation by deceitful means is, in essence, fraud, and ex-Chief Petty Officer 2nd Class Tobin has not been convicted of fraud and will not be punished for what he has not been convicted of.

[46] In relation to the second point that was raised, the use of colleagues who trusted him, and the court's statement that it has not taken that into account as an aggravating factor. It is clear that ex-Chief Petty Officer 2nd Class Tobin, when he was dealing with the purchasers, was someone who was generally respected and liked. But there is no evidence that he involved them in his scheme by, for example, trying to get them to overlook something or to give into pressure on his part. The breach of trust that the court has considered, and that he has been convicted of, is towards the institution, not towards individuals.

[47] The third issue raised by the prosecution was the issue of delay and whether the court had misapplied or misunderstood the evidence in this regard. The court's position, as the court stated, is that it took three years for this matter to, essentially, proceed from the date of the last offence that is listed in the charge sheet to the commencement of the court martial. I should say, 2 1/2 years from the date of the last offence, which ended up on the 31st of May, 2002, but approximately three years from January 2002, which is included in the charge that ex-Chief Petty Officer 2nd

Class Tobin pleaded guilty to. In that three years, the evidence is that ex-Chief Petty Officer 2nd Class Tobin has been released from the Canadian Forces with medical benefits.

[48] The court is happy to accept that it can infer that it is unlikely that any investigation began much before the 31st of May, 2002; that is, the last date on the charge sheet. Equally, it is clear that this is a complex case and is something that would not be completed in 30 or 60 days. There is evidence before the court that this matter was still being investigated in December 2002, where Exhibit 9 is an affidavit that says documents were produced to the military police in December 2002. There is no evidence before the court, as the prosecutor pointed out at an earlier stage, as to when charges were actually laid in this matter, so the court is not in a position to say when ex-Chief Petty Officer 2nd Class Tobin was first put in jeopardy. There is evidence before the court that the discovery of what the court would describe as related documents; that is, documents underlying conclusions for the investigation, were being made as late as last week.

[49] The court is not in a position to say whether or not the time taken is fully warranted or unwarranted. But it can, and has, taken into account that three years is a reasonably long time. The court has reconsidered the submissions of the prosecution to see whether or not it is satisfied that they justify the 34 days of imprisonment or show a fundamental error in the reasoning of the court that would cause it to re-evaluate the sentence proposed. The court has come to the conclusion that none of these matters would warrant a re-evaluation of imprisonment , and, therefore, the court has not changed its evaluation on that basis.

[50] The defence made two submissions. One was, briefly, with regard to the amount of the proposed fine, and the submission was, in essence, that perhaps it should be no more than the profit that was inferred. The court would indicate that that was not a guiding criteria in this matter, though it would be something that would indicate a minimum amount for any fine. Rather, the court would have imposed a much higher fine except for the mitigating factors that have been presented. The defence also raised whether or not the court had considered the undisclosed documents in this matter. The court would indicate, if they had occasioned further delay, then the court would have taken that delay into account eventually, if a conviction had resulted in this case. In these circumstances they have not been taken into account to reduce the punishment.

[51] The court has listened to the submission of counsel and considered them, and has not been convinced that imprisonment in excess of 30 days is warranted in the case of this offence and this offender, and is still of the view to impose such a sentence would not be in the public interest.

[52] Please stand, ex-Chief Petty Officer 2nd Class Tobin. The court sentences you to a severe reprimand and a fine in the amount of $3,000. The proceedings in relation to ex-Chief Petty Officer 2nd Class Tobin have now been terminated.

COLONEL K.S. CARTER, M.J.

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