

Citation: *R. v. Ex-Second Lieutenant M. Barnaby*, 2007 CM 1010

Docket: 2006100

**STANDING COURT MARTIAL
CANADA
BRITISH COLUMBIA
ESQUIMALT**

Date: 10 May 2007

PRESIDING: COLONEL M. DUTIL, C.M.J.

HER MAJESTY THE QUEEN

v.

**EX-SECOND LIEUTENANT M. BARNABY
(Accused)**

SENTENCE

(Rendered Orally)

[1] Having accepted and recorded the plea of guilty in respect of the second charge, the court finds you guilty of that charge and the court directs a stay of proceedings with respect to the first charge.

[2] It has long been recognized that the purpose of a separate system of military justice is to allow the Armed Forces to deal with matters that pertain directly to discipline, efficiency and morale of the military. It's also recognized that in the military context it may, in appropriate circumstances, justify, and at times require, a sentence that will promote military objectives. That being said, the punishment imposed by any tribunal; military or civil, should constitute the minimum necessary intervention that is adequate in the particular circumstances.

[3] In determining sentence today I have considered the totality of the circumstances surrounding the commission of the offence as revealed by the Statement of Circumstances that you have accepted as conclusive evidence as well as the Agreed Statement of Facts.

[4] In a nutshell the circumstances and the facts surrounding this offence are as follows: On the evening of 30 September 2005, you were observed at a nightclub smoking what appeared to be a marihuana cigarette. As the investigator suspected that

you and another person were members of the Canadian Forces, one of the policemen asked one of you if you were in the military, to which you replied, Yes.

[5] It seems that one of the two persons had been smoking a marihuana cigarette and this person was you. According to the statement of circumstances, you dropped the remnant of the marihuana cigarette that you had been smoking and it was seized by the police which was later analyzed and revealed that it was a controlled substance that contained tetrahydrocannabinol which is, of course, a controlled substance under the *Controlled Drugs and Substances Act*. The evidence also indicates that you were aware of the prohibition on using drugs in the Canadian Forces.

[6] The evidence also reveals that you were on duty at the time, not only on duty but as the Squadron Duty Officer. There is evidence that although you are not required to be within the unit or at the unit headquarters within the unit lines at the time but you still had the—you were still the Squadron Duty Officer at the time of the offence.

[7] In determining sentence I have also considered the documentary evidence that was filed before me. I've also considered the testimony of Major Leblanc, formerly Lieutenant-Colonel Leblanc, who was the commanding officer at the time of the offence. I've also considered the testimony of Major Sharpe as well as your own testimony. Finally, I have taken into account the submissions made by counsel; both counsel. This information was reviewed in light of the sentencing principles and objectives. Finally, I've taken into consideration or I've taken into account any direct or indirect consequences that the finding and sentence will have on you, despite the fact that you have already been released from the Canadian Forces for the same incident.

[8] Of course counsel know about the objectives and principles of sentencing but others may not. Those objectives and principles have to be used by courts each and every time in considering what should be an appropriate sentence and they relate generally to the following: first one is the protection of the public and that includes the Canadian Forces; second element or second principle is the denunciation of the conduct and of the offender; thirdly there's the punishment of the offender. Further, there's the deterrent effect of the punishment, not only on the offender but on others who might be tempted to commit the same or similar offences. In addition there's the reformation and rehabilitation of the offender and also the principle that the punishment imposed for a particular offence must be proportionate to the crime and to the offender. That's what the defence was referring to as the punishment must fit the crime but also it must fit the offender. And there's also the parity of sentence, that's what the prosecution referred to as, that the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Which principle and objective will have precedence over others will vary on a case-by-case basis. In some cases rehabilitation might be the first principle or first objective, in others denunciation,

punishment of the offender might be. In this case I agree with the prosecution that the sentence in this case must emphasize general deterrence and denunciation however I find that the case law provided were of little or no assistance to the court.

[9] This case is, in the court's opinion, a prime example of blatant disregard for basic military discipline and disrespect for the CF drug policy for the unauthorized use of drugs by young commissioned officers. It is highly aggravated by the fact that the offender was not only on duty at the time of the offence but that he was vested with the duties and responsibility of unit duty officer when the offence was committed.

[10] In addition to the need to promote general deterrence, I would also add that this sentence must, nevertheless, reflect the sentencing principles of denunciation.

[11] The court finds that the facts of this case are extremely serious in the context of the use of even a small quantity of cannabis, contrary to *QR&O* 20.04. Not only does it show a blatant disregard by an officer of the drug policy, it reveals a profound lack of professionalism and integrity required even at the most junior level.

[12] Your service in the Canadian Forces has been very brief, but I think there's no doubt that you are genuinely remorseful for your past conduct which, of course, already led to your release from the Canadian Forces and I think your testimony is also a message to your ex-colleagues and any person who joins the Canadian Forces that this matter should always be taken very seriously.

[13] The pursuit of the disciplinary process under part 3 of the *National Defence Act* which ultimately brought us here today, the trial itself and your plea of guilty must play an important role in achieving the general deterrence. The quantum of the fine is not, in this context, a key factor. The punishment of a reprimand, which is higher in the scale of punishments than a fine, must be used to highlight the seriousness of the misconduct. I generally agree with counsel as to the aggravating and mitigating factors in this case. Of course, the fact that you were not only on duty but the Unit Duty Officer at the time of the offence is of the utmost importance. You were entrusted with the same responsibilities that other officers in your unit, despite your lack of experience. The fact that you were on OJT; on job training pending your air navigation course, does not mitigate your responsibility. It was common practise for members on OJT at your rank level, to perform the duties of Squadron Duty Officer. Although this was not a complex task it was a significant one where you represented the commanding officer, a position of trust and were expected to demonstrate professionalism, integrity as well as a sound and clear judgement. As indicated by the evidence, it is, however, the first incident of this nature ever to involve a Squadron Duty Officer, regardless of his rank.

[14] As I have said previously, the facts of this case demonstrate your profound lack of judgement and total disrespect of the most basic Canadian Forces

policy. This is not simply the demonstration of the lack of maturity by a junior officer who, despite his lack of experience, not only should have known better but knew better. No one should be surprised by the fact that the seriousness of your conduct caused the chain of command to react promptly in recommending your immediate release which became effective 27 July 2006, but I must take that release or that decision into account in sentencing you today.

[15] But there are important mitigating factors as well. Your plea of guilty is mostly important in the context of this case particularly after your testimony where you offered no excuses for your conduct and profound lack of judgement. There's no doubt that these court proceedings or court process and your presence in court should serve as a clear message that such conduct is not to be tolerated. Let's hope that the important presence of ex-colleagues in the audience should help others to understand that there are broad and severe consequences for such conduct. The fact that you did not have a previous disciplinary or criminal record is also a significant factor as well as your young age and that in order to mitigate the sentence. You also have no current employment. Finally, the court accepts that the passage of time should be taken into account to mitigate the sentence but to a lesser degree.

[16] It is important to note that you will now have a criminal record as a result of this finding and this sentence. This also should serve for general deterrence and the fact that you will have a criminal record illustrates the seriousness of the conduct that brought you to the court today but as far as you're concerned it will also effect your immediate future. This element should also serve as a deterrent for others who might minimize the importance of your past conduct.

[17] For these reasons, ex-Second Lieutenant Barnaby, the court sentences you to a reprimand which is accompanied by a fine of four hundred dollars payable at a rate of one hundred dollars per month effective today. The fine will be paid by certified cheque or money order to the Receiver General of Canada at the address that will be provided to you and to your counsel by Mr Prosecutor.

[18] The proceedings of this standing court martial in respect of ex-Second Lieutenant Barnaby are terminated. Thank you.

COLONEL M. DUTIL, C.M.J.

Counsel:

Major S.D. Richards, Regional Military Prosecutor Atlantic

Counsel for Her Majesty the Queen

Lieutenant-Commander J.C.P. Lévesque, Directorate of Defence Counsel Services

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