



COURT MARTIAL

Citation: *R v Fondren*, 2011 CM 4005

Date: 20110304

Docket: 201055

Standing Court Martial

Canadian Forces Base Borden
Borden, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Private R.M. Fondren, Applicant

Before: Lieutenant-Colonel J-G Perron, M.J.

REASONS FOR DECISION WITH RESPECT TO A BREACH OF SECTION 9 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*.

(Orally)

INTRODUCTION

[1] The applicant, Private Fondren, is charged with having disobeyed the lawful command of a superior officer. More specifically, he is accused of refusing to gather together items of his kit as ordered by Chief Warrant Officer Stone. The applicant has made an application under subparagraph 112.05 (5)(e) of the *Queen's Regulations and Orders for the Canadian Forces (QR&O)* alleging that he was arrested arbitrarily and then detained arbitrarily in contravention of his rights under section 9 of the *Canadian Charter of Rights and Freedoms*. The applicant requests that, as the appropriate remedy for these alleged breaches, the court order a stay of proceedings pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* or, in the alternative, consider these breaches in mitigation of sentence.

[2] The respondent submits the applicant has not met the onus of proving the breaches on the balance of probabilities. The respondent submits that in the event the court does decide there has been a breach of the applicant's rights, a stay of proceedings is not appropriate in this case.

[3] The application was heard at the beginning of the trial. The court decided to render its decision at the end of the trial. Private Fondren pled guilty to the charge and a sentencing hearing ensued. The evidence presented by the applicant during the application consisted of the testimony of Private Fondren, Chief Warrant Officer Stone, Sergeant Blais and an affidavit from Lieutenant-Commander Walden. The court took judicial notice of the facts contained in Military Rules of Evidence (MRE) 15. The applicant presented three exhibits.

[4] Firstly, I will review the facts that are not contested in this application. Private Fondren was a student at the Canadian Forces School of Aerospace Technology and Engineering at the time of the offence. Private Fondren was tried summarily on Friday, 16 July 2010 and he was sentenced to four days of confinement to barracks (CB). He was unhappy with the outcome of this trial and informed his assisting officer he wanted a review of this summary trial. He was told a review would take some time and that he would have to serve his punishment. Article 108.45 of *QR&O* provides for the review of findings and punishment for summary trials. This article only allows for the suspension of the punishment of detention pending the completion of the review.

[5] Private Fondren met with Chief Warrant Officer Stone, the school's Chief Warrant Officer, after the summary trial. Chief Warrant Officer Stone explained the CB procedures and the Base Borden Standing Order pertaining to CB. Private Fondren refused to sign a document stating he understood the rules pertaining to CB. He then left Chief Warrant Officer Stone's office accompanied by an escort to collect the items of kit he needed for his punishment of confinement to barracks. He told the escort he would not gather his kit for the CB. The escort brought Private Fondren to Chief Warrant Officer Stone. Chief Warrant Officer Stone told Private Fondren numerous times that he had to collect his kit. Private Fondren replied no initially and then remained silent. Chief Warrant Officer Stone called the Deputy Judge Advocate's (DJA) office to obtain legal advice. Chief Warrant Officer Stone then informed Private Fondren that he had the choice of collecting his kit for his CB or to be put under arrest by Chief Warrant Officer Stone. Private Fondren again said he would not collect his kit; Chief Warrant Officer Stone called the military police. Chief Warrant Officer Stone arrested, without a warrant, Private Fondren at 1500 hours on 16 July and asked the military police to bring Private Fondren to the guardroom.

[6] Private Fondren was brought to the guardroom by the military police and Chief Warrant Officer Stone also made his way to the guardroom. Chief Warrant Officer Stone, with the assistance of Sergeant Blais, the non-commissioned officer (NCO) in charge of the guardroom, completed an account in writing. Chief Warrant Officer Stone made arrangements to have personnel available to guard Private Fondren until Monday

morning. Private Fondren spoke to duty counsel during the evening of 16 July. Private Fondren was released under conditions at approximately 1625 hours on 17 July 2010.

[7] The relevant provisions of the *Charter of Rights and Freedom* that apply in this matter are sections 9 and 24(1). Section 9 reads as follows:

Everyone has the right not to be arbitrarily detained or imprisoned.

Section 24(1) reads as follows:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[8] Subsection 154(1) of the *National Defence Act (NDA)* provides that:

Every person who has committed, is found committing or is believed on reasonable grounds to have committed a service offence, or who is charged with having committed a service offence, may be placed under arrest.

[9] Article 105.01 of the *QR&O* reproduces subsection 154(1) and provides at Note B that:

A person who has been or may be charged need not necessarily be placed or retained under arrest. The circumstances surrounding each case should be considered in order to determine whether arrest is appropriate.

[10] In *R v Gauthier*¹ the Court Martial Appeal Court (CMAC) examined the powers of arrest without warrant of members of the military police granted by section 156 of the *NDA*. The CMAC concluded that the exercise of that power of arrest must be justified in the circumstances because of the particularly prejudicial nature of this power to an individual's rights and freedoms. The court noted that section 495 of the *Criminal Code of Canada* gives a police officer the power to arrest a person but also:

... prohibits the police officer from doing so if he or she believes on reasonable grounds that the public interest may be satisfied without arresting the person and has no reasonable grounds to believe that the person will fail to attend court. The concept of public interest in this context refers, among other things, to the need to establish the identity of the person and to prevent the repetition or continuation of the offence or the commission of another offence.

The CMAC then concluded that the requirements governing the power of arrest found in the *Criminal Code*:

¹ [1998] CMAJ No. 4, CMAC-414.

... have become minimum requirements for the valid exercise of the power of arrest.²

[11] Chief Warrant Officer Stone is not a member of the military police. His powers of arrest stem from subsection 155(2) of the *NDA*. More precisely in the present case, paragraph 155(2)(a) reads as follows:

A non-commissioned member may, without a warrant, in the circumstances described in section 154, arrest or order the arrest of

... any non-commissioned member of lower rank ...

[12] When one reads section 154 and subsection 155(2) together, one concludes that this power of arrest has a narrower scope than the power of arrest found at section 156. Subsection 155(2) focuses solely on the power of arrest without warrant whereas section 156 permits the arrest without warrant and detention. Subsection 155(2) only permits the arrest without warrant of a non-commissioned member while section 156 permits the arrest without warrant and the detention of any person who is subject to the Code of Service Discipline. Finally, section 156 also allows the arrest of a person who is believed on reasonable grounds to be about to commit a service offence. Notwithstanding these differences, the power of arrest under subsection 155(2) is quite large and gives a non-commissioned member practically the same powers of arrest vis-à-vis a non-commissioned member of lower rank as those of a member of the military police in similar circumstances.

[13] The respondent has not argued the discretion should be exercised in a different manner. I have not been provided with any evidence nor can I see any reason why the powers of arrest granted to a non-commissioned member would be applied in a different manner than those of the military police. Therefore, I conclude that the requirements governing the power of arrest found in the *Criminal Code* which have become minimum requirements for the valid exercise of the power of arrest under section 156 also apply in the case of an arrest made pursuant to subsection 155(2).

[14] The CMAC noted the requirements governing the exercise of the power of arrest found at section 495 of the *Criminal Code* are only found at section 158 of the *NDA*. Section 158 pertains to the release from custody by the person making the arrest. Article 105.12 of the *QR&O* reproduces subsection 158(1) of the *NDA*. The Note to article 105.12 reads as follows:

The mere fact that an investigation is not yet complete or the mere possibility of the alleged offender going absent without leave will not normally be considered sufficient reason to hold an alleged offender in custody.

[15] In *du-Lude v Canada*, [2001] 1 FC 545, Justice Letourneau, writing for the Federal Court of Appeal and who had also written the decision of the CMAC in *Gauthier*, had

² *Ibid* at paras 22-26. See also *Lui v R* 2005 CMAC 3 at para 7.

to decide if the appellant had been legally arrested by the military police. He discussed at paragraph 12 of *du-Lude* the circumstances which could lead to the arrest without warrant of a soldier who fails to be present at his place of duty. Paragraph 12 reads as follows:

There is no doubt, in view of the Armed Forces' mission, that the public interest may, for example, in wartime or in peacekeeping or peace-restoring missions, or in training periods for such missions, justify the arrest without warrant of a soldier who fails to be present at his place of duty or remain there. Such conduct may be much more than a breach of discipline: it may threaten the military objectives and safety of property or of other civilian or military personnel. In saying that, I do not in any way suggest that military objectives or operations cannot be threatened or affected by such conduct in peacetime or that it may not then be permissible, even essential, to use the power of arrest; however, the circumstances in the case at bar are clearly not of that kind: quite the contrary.

[16] It is clear from the *Gauthier* and *du-Lude* decisions as well as from Note B to article 105.01 and the Note to article 105.12 that the power of arrest must be exercised carefully and in a manner that will respect the fundamental right that one's liberty is not to be restricted unnecessarily and in an arbitrary manner.

[17] Chief Warrant Officer Stone testified the kit was needed for the CB in accordance with the Base Borden Standing Administrative Instructions. He was taken aback by Private Fondren's reaction to his order because, as he said, "few people say no to me, especially privates." During his cross-examination, he stated the school may have up to 900 students at its peak and that they have conducted at least 70 summary trials in the past two years. Sixty-eight of these summary trials resulted in a punishment of CB. An offender had never said no to him prior to Private Fondren.

[18] He needed time to think about the situation and told Private Fondren to wait outside his office. He called the DJA's office and spoke with the DJA Chief Warrant Officer. He testified it was a three-way conversation in that he would speak to the DJA Chief Warrant Officer who would speak to the DJA and then relay the information from the DJA to Chief Warrant Officer Stone. This is how he obtained his "legal advice" on the next steps he was about to undertake. Based on this legal advice, he determined that he had to arrest Private Fondren if he did not comply with his order.

[19] He told Private Fondren he had the choice of complying with his order or be placed under arrest. He would have given Private Fondren approximately eight to ten opportunities to comply with his order before he arrested him. Private Fondren did not show any lack of respect towards Chief Warrant Officer Stone and did not use any vulgarities when he was refusing to obey the order, in fact he was mostly silent.

[20] Chief Warrant Officer Stone testified he had no choice but to arrest him. He stated he could not drag him to get his kit and he could not drag him to confinement barracks, but the military police could. The account in writing, Exhibit M1-4, signed by Chief Warrant Officer Stone includes two reasons why Private Fondren was retained in

custody; namely, attendance in court and continuation of the offence. Chief Warrant Officer Stone testified that he did not recall why attendance in court was written on that form. There was nothing in the past or any actions or statements by Private Fondren that would indicate he would not attend court. During his cross-examination, he stated Sergeant Blais completed the form and that he did not tell Sergeant Blais to insert attendance in court. He believed that Sergeant Blais just "cut and pasted" the form on his computer. The continuation of the offence was the disobedience of a lawful command. He testified that he had no expectation or hope that Private Fondren would comply and obey the order. The offence would thus stop when Private Fondren would comply with the order.

[21] He went back to his office and organized a guard schedule for Private Fondren for the weekend. He hadn't decided how long he would keep him in custody because he hadn't yet discussed this matter with his legal advisor. During the evening of 16 July, he read the *QR&Os* online to decide his course of action. He had received legal advice for the arrest, but as he said "not then what." He stated that Private Fondren was in "closed custody". The next day he attempted unsuccessfully to reach the DJA to obtain legal advice.

[22] He discussed the situation with Major Pellerin, the custody review officer, on 17 July and they reached the conclusion that Private Fondren could be released under certain conditions. Private Fondren was to report to the CFB Borden Base Duty Officer at 1800 hours on 17 and 18 July. He was now of the opinion that the offence had stopped because he considered it to be a "singular event." He explained that Private Fondren had been given an opportunity to obey the order and had refused. He explained why Private Fondren had not been sent to complete his CB by stating that Major Pellerin and he had discussed the matter and had concluded that spending approximately 24 hours in a jail cell and reporting to the base duty officer would suffice. He stated that jail was "in the spirit of serving some of the CB." He wanted to "move on from this unpleasantness".

[23] During his cross-examination, when asked why the continuation of the offence had ceased to be a concern on 17 July, he stated that he moved on from the CB and he was focusing on the disobedience of the order he had given. He did not think there was a need to keep Private Fondren in cells while he waited to obtain legal advice concerning a charge. He further testified on the inconvenience of having people guard Private Fondren during a weekend and that it was not a winning situation for anyone and it was not "a happy thing to be doing".

[24] Sergeant Blais testified that he understood Chief Warrant Officer Stone wanted Private Fondren to remain in cells until Monday morning. He told Chief Warrant Officer Stone he had to comply with the provisions of the *NDA* and of *QR&O* pertaining to pre-trial custody. He informed his platoon commander of his concerns. He completed the account in writing form on his detachment computer by starting from a blank form and he testified Chief Warrant Officer Stone told him the reasons for the detention.

[25] Liberty is a fundamental right in Canada and members of the Canadian Forces also possess that right. The respondent, the prosecutor, argued that to do nothing would

have been contrary to public interest. The public interest at stake in this matter is the continuation of the offence. The court, based on the evidence, has come to the following conclusions. The court does not accept Chief Warrant Officer Stone's explanation that he had to place Private Fondren under arrest to stop the continuation of the offence. Chief Warrant Officer Stone was surprised by Private Fondren's refusal to obey his order. He contacted the base DJA's office and obtained what he describes as legal advice via the DJA Chief Warrant Officer. Following this telephone conversation he decided to give Private Fondren the choice of retrieving the items of kit required for the punishment of CB or to be placed under arrest.

[26] The needs of discipline, a specific public interest or a proper legal justification will support a power of arrest under appropriate circumstances. The *NDA* grants officers and non-commissioned members the power to arrest without warrant their subordinates as a tool to promote good order and discipline within the Canadian Forces since it is their lawful duty to do so.³ This power to deprive a person of his or her liberty must be exercised with great care and with the proper respect for the rights of individuals and the needs of the Canadian Forces. This is a serious and severe measure that cannot be used lightly.

[27] Chief Warrant Officer Stone testified he went to visit Private Fondren at the guardroom Saturday morning because his welfare was paramount. Article 5.01 of *QR&O*, directs that a non-commissioned member shall become acquainted with, observe and enforce the *NDA*, *QR&O*, and all other regulations, rules, orders and instructions that pertain to the performance of the member's duties and promote the welfare, efficiency and good discipline of all who are subordinate to the member. As is the case for all officers and all non-commissioned members, the welfare and proper discipline of their subordinates will be better served by one's correct knowledge of his or her lawful authority, the appropriate application of the law and the respect of his or her subordinate's rights.

[28] The court concludes that Chief Warrant Officer Stone had one goal in mind: Private Fondren would either serve his CB or be placed under custody of the military police. Either option would ensure Private Fondren would be confined. Chief Warrant Officer Stone's explanations as to why he had no choice but to arrest Private Fondren, the condition of his release from custody, requiring Private Fondren to report to the base duty officer and the explanation as to why Private Fondren did not have to serve his sentence of CB, support this conclusion. The court is not condoning Private Fondren's conduct or his refusal to obey an order, but the court must assess the facts that surround the exercise of the discretionary power of arrest under the light of the applicable law.

[29] While the court does not know the content of the legal advice he would have received via the DJA Chief Warrant Officer, Chief Warrant Officer Stone clearly stated he had only received advice concerning the arrest and "not then what." He decided on 16 July that Private Fondren would remain in custody. He signed an account in writing for which he cannot clearly explain why attendance in court is listed as one of the reasons to

³*QR&O* 4.02; *QR&O* 5.01.

keep Private Fondren in custody. Chief Warrant Officer Stone referred to Private Fondren being under "closed custody". This term is not found in the *NDA* or in *QR&O* and has not been present in the legislation for quite a few years.

[30] The court has not accepted Chief Warrant Officer Stone's evidence concerning the need to stop the continuation of the offence and it has not been provided with any evidence as to how the maintenance of discipline was served by the actions taken by Chief Warrant Officer Stone on 16 July. Private Fondren indicated he would not gather his kit. These events occurred in Chief Warrant Officer Stone's office, not in a public place. Private Fondren is presently subject to further disciplinary actions because he refused an order. The present court martial has been attended by a number of spectators. This court has not been presented with any evidence pertaining to any possible negative impact on the discipline of the school by the refusal of Private Fondren to obey Chief Warrant Officer Stone's order. This court has not been presented any evidence that demonstrates the arrest and the detention of Private Fondren on 16 and 17 July 2010 were necessary to promote the good order and discipline of the school or were justified by a public interest.

[31] Chief Warrant Officer Stone made a rash decision when he arrested Private Fondren. He compounded that decision by keeping him detained. This arrest, detention and the conditions imposed upon release were means of restricting Private Fondren's liberty, thus ensuring the punishment of CB had in effect been served. This is not the correct justification for arresting someone and then detaining that person. In fact, it flies in the face of the law governing the powers of arrest.

[32] Defence counsel stated there was no allegation of malice on the part of Chief Warrant Officer Stone. While the court will not find that Chief Warrant Officer Stone acted out of malice, it does find that he did not take the necessary steps to ensure that he was in fact choosing the right course of action for the right reasons. The court is quite perplexed in the manner that he obtained his "legal advice." He would probably be better served in the future by speaking directly to a military lawyer when seeking legal advice on such important matters. Also, he only sought advice concerning the arrest of Private Fondren and did not seem to consider the next step in the sequence of events and thus failed to seek legal advice on the continued detention until the next day. His evidence concerning the account in writing leads one to conclude that he did not pay much attention to this document and its significance. This is an important document that is signed by the person making the arrest and it informs the person under arrest why he or she is to remain under custody. It is thus obvious why one must focus his or her mind when making this important decision and completing the account in writing.

[33] This court is left with the impression that Chief Warrant Officer Stone only truly began to inquire during the evening of 16 July about the law and the regulations that governed the events that had occurred in his office. He then suggested conditions to the custody review officer that would somewhat compensate for Private Fondren's refusal to get the necessary kit for the CB. How can one associate the need to report to the base duty officer at 1800 hours on Saturday, 17 July and Sunday, 18 July with the offence of having disobeyed the order of gathering items of his kit? He clearly stated that attendance in

court was not a concern. The custody review officer agreed with these recommendations. While malice might not have been involved in this matter, the court finds there was an abuse of authority on the part of Chief Warrant Officer Stone.

[34] In *R v Carosella*, [1997] 1 SCR 80, at paragraph 52, Sopinka J., writing for the majority states:

A judicial stay of proceedings has been recognized as being an extraordinary remedy that should only be granted in the "clearest of cases". In her reasons in *O'Connor*, L'Heureux-Dubé J. stated (at para.82) that:

It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

[35] Having carefully reviewed the case law provided by counsel, I have come to the conclusion that a stay of proceedings is not appropriate in this matter. The actions of Chief Warrant Officer Stone have not prejudiced Private Fondren's right to make full answer and defence. I have not been provided with evidence that would make me conclude that irreparable prejudice would be caused to the integrity of the military justice system if the prosecution was continued. The decision in this application and a significant reduction of the sentence will send a clear message that unjustified arrest and detentions in circumstances such as those present in this case will not be condoned by courts martial.

FOR THESE REASONS, THE COURT

[36] **ALLOWS** the application made under paragraph 112.05 (5)(e), but the court does not direct a stay of proceedings pursuant to paragraph 24(1) to the *Charter of Rights and Freedoms*.

[37] **CONCLUDES** that the proper remedy in this case is a reduction of the sentence.

Counsel:

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