COURT MARTIAL

Citation: *R v Weldam-Lemire*, 2011 CM 4019

Date: 20110623
Docket: 201107

Standing Court Martial

Canadian Forces Base Esquimalt
British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Ex-Ordinary Seaman S. Weldam-Lemire, Offender

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

REASONS FOR SENTENCE

[1] Ex-Ordinary Seaman Weldam-Lemire, the court, at the conclusion of a complete trial has found you guilty of having disobeyed the lawful command of a superior officer and of being absent without leave on two occasions. You were absent from your duty watch onboard HMCS CALGARY from 0730 hours to 1245 hours on 12 December 2010. You failed to report to Chief Petty Officer 1st Class Price at 1130 hours on 11 January 2011 as ordered by Chief Petty Officer 1st Class Price and you were absent from you duty watch onboard HMCS CALGARY from 1130 hours on 11 January 2011 until 0730 hours on 12 January 2011. The court must now impose a fit and just sentence.

[2] The principles of sentencing which are common to both courts martial and civilian criminal trials in Canada have been expressed in various ways. Generally, they are founded on the need to protect the public and the public, of course, includes the Canadian Forces.

[3] The Court Martial Appeal Court of Canada clearly stated that the fundamental purposes and goals of sentencing as found in the *Criminal Code of Canada*[1] apply in the context of the military justice system and a military judge must consider these purposes and goals when determining a sentence[2]. The fundamental purpose of sentencing is to contribute to respect for the law and the protection of society, and this includes the Canadian Forces, by imposing just sanctions that have one or more of the following objectives:

> (a) to denounce unlawful conduct;
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> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
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> (d) to assist in rehabilitating offenders;
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> (e) to provide reparations for harm done to victims or to the community; and
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> (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

[4] The court must determine if protection of the public would best be served by deterrence, denunciation, rehabilitation, or a combination of those factors.

[5] As indicated by the Court Martial Appeal Court sentencing is a fundamentally subjective and individualized process where the trial judge has the advantage of having seen and heard all of the witnesses and it is one of the most difficult tasks confronting a trial judge[3].

[4] The sentencing provisions of the *Criminal Code* at sections 718 to 718.2 also provide for an individualized sentencing process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender. A sentence must also be similar to other sentences imposed in similar circumstances. The principle of proportionality is at the heart of any sentencing[4]. The Supreme Court of Canada tells us at paragraph 42 of *Nasogaluak* that proportionality means a sentence must not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence.

[5] The court must impose a sentence that should be the minimum necessary sentence to maintain discipline. The ultimate aim of sentencing is the restoration of discipline in the offender and in military society. Discipline is that quality that every CF

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[1] R.S., 1985, C. C-46
[2] See *R v Tupper* 2009 CMAC 5, para 30
[3] See *R v Tupper 2009* CMAC 5, para 13
[4] See *R v Nasogaluak*, 2010 SCC 6, para 41

member must have which allows him or her to put the interests of Canada and the interests of the Canadian Forces before personal interests. This is necessary because Canadian Forces members must willingly and promptly obey lawful orders that may have very devastating personal consequences such as injury and death. Discipline is described as a quality because ultimately, although it is something which is developed and encouraged by the Canadian Forces through instruction, training and practice; it is an internal quality it is one of the fundamental prerequisites to operational efficiency in any armed force.

[6] The prosecution and your defence counsel have jointly proposed a sentence of imprisonment for a period of 10 days and a fine in the amount of 1000 dollars to be paid within 90 days. They also propose the court suspend the carrying into effect of the punishment of imprisonment.

[7] The Cour Martial Appeal Court has stated 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 unfit, unreasonable or is not in the public interest.

[8] You joined the Canadian Forces in June 2009. Having completed your recruit training in September 2009, you were then posted to the Canadian Forces Fleet School Esquimalt. You then posted to HMCS CALGARY in February 2010. You were released from the Canadian Forces under item 5(f) of article 15.01 of the QR&O on 23 May 2011. You were a member of the Canadian Forces for approximately 23 months.

[9] I will firstly deal with the evidence in mitigation of sentence.

[10] You were under military custody for three days during the period of 13 to 15 January 2011. The court has already found that you were detained arbitrarily by the military police in breach of your rights under section 9 of the *Canadian Charter of Rights and Freedoms* and that the appropriate remedy for this breach would be a mitigation of sentence.

[11] The offence of absence without leave is objectively one of the least serious offences under the Code of Service Discipline since the maximum sentence is imprisonment for less than two years. You were absent without leave from your duty watch from 0730 to 1245 hours on 12 December 2011 and from 1130 hours on 11 January 2011 to 0730 hours on 12 January 2011. These absences occurred when HMCS CALGARY was alongside at CFB Esquimalt undergoing a refit. You were one of the two duty brow watchkeepers and, on each occasion, another sailor had to replace you because of your absence. Your absences display a lack of respect for your chain of command and for your fellow sailors. They caused unnecessary hardships to your fellow sailors and were an additional administrative burden for your chain of command. Subjectively, these offences are not the most egregious examples of absence without leave but they did have a negative effect on your fellow sailors and on your chain of command.

[12] You were born in May 1987. You were 23 years old at the time of the offences. Your young age is considered a mitigating factor. Your short time in the Canadian Forces at the time of the offences, approximately 19 months, does not carry as much weight as it would normally since you have a lengthy conduct sheet; you should have learned from your previous encounters with the military justice system.

[13] I have reviewed the letter from your present employer at Exhibit 12. You have found employment immediately upon your release from the Canadian Forces. Your employer states you show potential as a labourer. He also mentions you will lose your employment should you be unable to perform your duties on site from Monday to Saturday.

[14] You have been released from the Canadian Forces under item 5(f). This item of release applies to the release of an officer or non-commissioned member who, either wholly or chiefly because of factors within his control, develops personal weakness or behaviour or has domestic or other personal problems that seriously impair his usefulness to or impose an excessive administrative burden on the Canadian Forces. It appears that the numerous offences of absence without leave and other infractions found on your conduct sheet were the main reason for this compulsory release.

[15] I will now address the aggravating factors of this case.

[16] In the short period of time you were a member of the Canadian Forces you were tried summarily on eight occasions. The court may only consider seven of these trials when determining the sentence since the last offence occurred after the commission of the offences before this court.

[17] You conduct sheet contains four charges of absence without leave which occurred on 16 October 2009, 18 December 2009, 1 April 2010 and 19 to 20 August 2010. These absences without leave ranged from two hours to 26 hours. You were found guilty of drunkenness twice and these offences occurred on 13 May 2010 and 18 June 2010. You were found guilty of having disobeyed Chief Petty Officer 1st Class Price's lawful command on 19 August 2010. It is quite a busy conduct sheet for such a short period of time.

[18] I see a certain pattern in this conduct sheet. It shows that you have not yet mastered the concept of self-discipline and of being a responsible and trustworthy person.

[19] The offence of disobeying a lawful command of a superior officer is objectively one of the most serious offences under the Code of Service Discipline since the maximum sentence is imprisonment for life. On 10 January 2011, you had been charged for being absent without leave and had been ordered by Chief Petty Officer 1st Class Price, the ship's coxswain, to report to his offence the next day to inform him whether you wished to be tried by court martial. You failed to report to his office on 11 January

2011. This behaviour shows a total lack of respect for authority and for the military justice system.

[20] On 31 August 2010, you were found guilty of absence without leave and of having disobeyed a lawful command of Chief Petty Officer 1st Class Price. You were absent for a period of 26 hours. You were sentenced to serve a period of detention of 15 days and you were imposed a fine in the amount of 1200 dollars.

[21] The majority in the *Tupper* decision has concluded that the punishments of dismissal from Her Majesty's Service and of detention cannot be imposed on an offender after his administrative release from the Canadian Forces. I am bound by that decision.

[22] The punishment of detention serves a rehabilitative purpose by re-instilling the habit of obedience in a structured, military setting. The offender is normally returned to his or her unit without any lasting effect on his or her career. I would have considered a longer period of detention as the appropriate sentence in the present case but I am precluded from doing so. You have already been released from the Canadian Forces and you have found employment. The rehabilitation of the offender and the mitigation of the sentence based on the breach of your right against arbitrary detention would have justified the suspension of the punishment of detention. I would have considered this punishment because it answers the need for general deterrence. Although this punishment would not necessarily serve to return you to your military duties, it would still assist you in improving yourself.

[23] The suspension of a punishment of detention has basically the same effect on the offender as the suspension of the punishment of imprisonment. The offender does not have to serve his or her punishment unless the conduct of the offender, since the punishment was suspended, has been such as to justify a remission of the punishment.

[24] I sincerely hope that you have learned from these mistakes and that you will move on and become a productive member of society. I agree with counsel that the principle of general deterrence is the most important sentencing principle in the present case but the court must also consider the rehabilitation of the offender and the specific circumstances of the case.

[25] After reviewing the totality of the evidence, the caselaw and the representations made by the prosecutor and your defence counsel, I have come to the conclusion that the proposed sentence would not bring the administration of justice into disrepute and that the proposed sentence is in the public interest. Therefore, I agree with the joint submission of the prosecutor and of your defence counsel.

FOR THESE REASONS, THE COURT:

[26] **SENTENCES** you to imprisonment for a period of 10 days and a fine of $1,000. The fine shall be paid no later than 24 September 2011.

[27] **SUSPENDS** the carrying into effect of the punishment of imprisonment.

Counsel:

Major G.T. Rippon, Canadian Military Prosecution Service
Respondent for Her Majesty the Queen

Major D. Bernsten, Directorate of Defence Counsel Services
Counsel for Ex-Ordinary Seaman S Weldam-Lemire