



COURT MARTIAL

Citation: *R v Weldam-Lemire*, 2011 CM 4017

Date: 20110622

Docket: 201107

Standing Court Martial

Canadian Forces Base Esquimalt
British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Ex-Ordinary Seaman S. Weldam-Lemire, Applicant

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

REASONS FOR THE APPLICATION UNDER S. 9 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS FOR ARBITRARY DETENTION

[1] The Applicant, Ex-Ordinary Seaman Weldam-Lemire is charged with having disobeyed the lawful command of a superior officer and with being absent without leave. The Applicant has made an application under sub-paragraph 112.05(5)(e) of the Queen's Regulations and Orders for the Canadian Forces alleging that he was detained arbitrarily in contravention of his rights under section 9 of the *Canadian Charter of Rights and Freedoms*. The Applicant requests that, pursuant to sub-section 24(1) of the *Canadian Charter of Rights and Freedoms*, the appropriate remedy for this alleged breach, is a mitigation of sentence should Ex-Ordinary Seaman Weldam-Lemire be found guilty. The Respondent admits there was an arbitrary detention contrary to section 9 of the *Charter* and agrees the appropriate remedy is a mitigation of sentence.

[2] The application was presented after the evidentiary portion of the trial. As suggested by both counsel, the court decided to render its decision immediately before pronouncing the finding for each charge. The evidence consisted of the testimony of

Chief Petty Officer 1st Class Price, Master Seaman Hussey, Petty Officer 2nd Class Guitare, Lieutenant(N) Erickson, Petty Officer 2nd Class Hopkinson, Warrant Officer Kelcey, Leading Seaman Schlauch and Corporal Gagnon. The court took judicial notice of the facts contained in Military Rule of Evidence 15. The Applicant presented three exhibits and the Respondent presented two exhibits.

[3] Firstly, I will review the facts in this application. Ex-Ordinary Seaman Weldam-Lemire was a member of the ship's company of HMCS CALGARY at the time of the alleged offences. It is alleged he was absent without leave from 0730 hours on 12 December 2010 until approximately 1245 hours on 12 December 2010. On 10 January 2011, Chief Petty Officer 1st Class Price laid one charge of absence without leave. On that day, he informed Ex-Ordinary Seaman Weldam-Lemire of his right to elect to be tried by court martial at 1100 hours and he ordered Ex-Ordinary Seaman Weldam-Lemire to report to his office at 1130 hours on 11 January 2011 to inform him of his decision.¹

[4] At approximately 0730 hours on 11 January 2011, Ex-Ordinary Seaman Weldam-Lemire was on duty aboard HMCS CALGARY and he asked his duty coxswain, Petty Officer 2nd Class Hopkinson permission to go to sick parade. Petty Officer 2nd Class Hopkinson told him to go to sick parade and to return to the ship and report back to him with his medical chit. Ex-Ordinary Seaman Weldam-Lemire went to the base clinic but did not return to the ship. The CO of HMCS CALGARY issued a warrant for the arrest of Ex-Ordinary Seaman Weldam-Lemire on 11 January 2011 in which it was alleged Ex-Ordinary Seaman Weldam-Lemire was absent without leave.² Ex-Ordinary Seaman Weldam-Lemire was arrested by Corporal Gagnon, a member of the CFB Esquimalt Military Police Detachment, at 1040 hours on 13 January 2011 at 945 Portage Rd, Esquimalt, British Columbia.³

[5] Ex-Ordinary Seaman Weldam-Lemire was brought to the guardroom by Corporal Gagnon. He was kept in custody until he was released by a custody review officer. Corporal Gagnon testified that he did not release Ex-Ordinary Seaman Weldam-Lemire from custody because he had arrested him pursuant to an arrest warrant.

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

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

Paragraph 24(1) reads as follows:

Anyone whose rights or freedoms, as a 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.

¹ See Exhibit 4

² See Exhibit 5

³ See Exhibit 6

Subsection 158(1) of the *National Defence Act* provides that:

A person arrested under this Act shall, as soon as is practicable, be released from custody by the person making the arrest, unless the person making the arrest believes on reasonable grounds that it is necessary that the person under arrest be retained in custody having regard to all the circumstances, including

- (a) the gravity of the offence alleged to have been committed;
- (b) the need to establish the identity of the person under arrest;
- (c) the need to secure or preserve evidence of or relating to the offence alleged to have been committed;
- (d) the need to ensure that the person under arrest will appear before a service tribunal or civil court to be dealt with according to law;
- (e) the need to prevent the continuation or repetition of the offence alleged to have been committed or the commission of any other offence; and
- (f) the necessity to ensure the safety of the person under arrest or any other person.

[7] Corporal Gagnon received his military police credentials in September 2009. It was the first time he was performing an arrest based on a CO's warrant for arrest. He did not consider whether the conditions found at section 158 were present to justify the continued detention of Ex-Ordinary Seaman Weldam-Lemire. He failed to exercise his duty as provide by section 158 of the *National Defence Act*.

[8] Liberty is a fundamental right in Canada and members of the Canadian Forces also possess that right. As stated by the majority decision in the Supreme Court of Canada decision of *R v Grant*, 2009 SCC 32 at para 54:

The s. 9 guarantee against arbitrary detention is a manifestation of the general principle, enunciated in s. 7, that a person's liberty is not to be curtailed except in accordance with the principles of fundamental justice. As this Court as stated: "This guarantee expresses one of the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with the law.": *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, 1 S.C.R. 350, at para. 88. Section 9 serves to protect individual liberty against unlawful state interference. A lawful detention is not arbitrary within the meaning of s. 9 (*Mann*, at para. 20), unless the law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9"

[9] Ex-Ordinary Seaman Weldam-Lemire's detention following his arrest was arbitrary because Corporal Gagnon did not apply the provisions of section 158 of the *National Defence Act* as was his duty to do so. Ex-Ordinary Seaman Weldam-Lemire should have been released from custody as soon as practicable unless Corporal Gagnon believed on reasonable grounds that it was necessary that Ex-Ordinary Seaman Weldam-Lemire be retained in custody having regard to all the circumstances and the criteria found at section 158.

[10] Having carefully reviewed the caselaw provided by counsel and based on the evidence before this court, I agree that a stay of proceedings is not appropriate in this matter. There is no evidence before the court that demonstrates that the actions of Corporal Gagnon prejudiced Ex-Ordinary Seaman Weldam-Lemire's right to make full answer and defence. I have not been provided with any evidence that would make me conclude that irreparable prejudice would be caused to the integrity of the military justice system if the prosecution were continued.

[11] For these reasons, the court grants the application made under paragraph 112.05(5)(e) and the court concludes that the proper remedy in this case is a mitigation of the sentence pursuant to paragraph 24(1) of the *Charter of Rights and Freedoms* should Ex-Ordinary Seaman Weldam-Lemire be found guilty. These proceedings under sub-paragraph 112.05(5)(e) of the Queen's Regulations and Orders for the Canadian Forces are terminated.

Counsel:

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Respondent for Her Majesty the Queen

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