**COURT MARTIAL**

**Citation:** *R v Déry*, 2013 CM 3026

**Date:** 20130920
**Docket:** 201307

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Private J.C. Déry, Applicant**

**Before:** Lieutenant-Colonel L.-V. d'Auteuil, M.J.

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[OFFICIAL ENGLISH TRANSLATION]

**Restriction on publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.**

## REASONS FOR DECISION

(Orally)

[1] Private Déry, the offender in this case, filed an application for release pending appeal, and a hearing was held in the late afternoon, early evening. His application was filed pursuant to section 248.1 of the *National Defence Act*.

[2] The offender submitted in evidence a series of documents, from LPA-2 to LPA-8, that were exhibits 8 to 14 in the main trial and that essentially give the same information about him. There is also a joint summary of facts, a letter of reference, the

conditions set for his release following his arrest on 25 October 2011 and a PDR. He also submitted his own testimony in evidence. He testified before the Court.

[3] The applicable criteria under section 248.3 of the *National Defence Act* are essentially used to determine whether the Court should order an applicant's release. The criteria are, one, that the person intends to appeal; two if the appeal is against sentence only, which does not apply here; the third criterion, that the person will surrender himself into custody when directed to do so; and finally, that the person's detention or imprisonment is not necessary in the interest of the public or the Canadian Forces. The burden of proof rests on the applicant, the offender in this case, Private Déry, and he must meet these criteria on a balance of probabilities.

[4] I would note from the outset that the seriousness of the offence does not bar this application from succeeding. However, it is something that the Court must consider in light of the other criteria. At this stage, I should also point out that the applicant no longer benefits from the presumption of innocence.

[5] I would like to refer to the decision of the Quebec Court of Appeal in *Delisle c R*, 2012 QCCA 1250, dated 6 July 2012, which is highly instructive in such cases. Although the Court of Appeal was considering an application for release pending determination of appeal under section 679 of the *Criminal Code*, that provision is similar to our own, to a certain point. So, at paragraph 16 of that decision, the Court of Appeal writes, and I quote:

> [TRANSLATION]
> In that respect, it is relevant to emphasize that the public can lose confidence in the administration of justice not only as the result of an accused's untimely release but also because of an unjustified refusal to release an accused pending the determination of his or her appeal. Indeed, the right to appeal trial decisions is integrated into our legal culture and our basic rules of law. The right to appeal allows individuals to have confidence in the penal and criminal justice systems as long as they are firmly convinced that while an error in fact or in law is reversed, on appeal and pending a decision, the accused can benefit from a release in the meantime should the circumstances allow it.

[6] As I mentioned during counsel's oral arguments, here, what I want to illustrate is the fact that keeping someone in detention when he or she must serve his or her sentence must also be assessed in relation to the right to appeal potentially unjustified decisions, and the Court must weigh everything properly. One criterion should not be given more importance than another. It is a balancing act, a balancing of interests in the circumstances.

[7] So, as regards the first criterion, that is, that the applicant intends to appeal, I find that he has proved his interest on a balance of probabilities through his testimony alone, which testimony the Court has no reason to doubt in the circumstances.

[8] As for the second criterion, the Court again finds that the applicant has proved on a balance of probabilities that he will surrender himself into custody when directed to do so. For two years, Private Déry has been complying with the release conditions imposed on him after his arrest. As I understand it, he has always complied with them and has never failed to appear for the proceedings relating to this court martial or the military justice system dealing with this court martial. He appeared on schedule, be it for adjournments or any other time before this Court, and there is nothing that would suggest to this Court that he will not comply with this criterion. Indeed, on a balance of probabilities, he has clearly shown the Court that he will surrender himself in the circumstances.

[9] Now, regarding the third criterion, that his detention or imprisonment is not necessary in the interest of the public or the Canadian Forces. As I mentioned previously, there are two decisions that I have in mind: first, the decision of the Court Martial Appeal Court in *Wilcox v R*, 2009 CMAC 7, and *Délisle*.

[10] So, the public interest criterion breaks down into two sub-criteria, and they are, first, the protection and safety of the public; and second, public confidence in the military justice system.

[11] Regarding the protection and safety of the public, I find that the applicant has shown on a balance of probabilities that the protection and safety of the public is not compromised. Clearly, because of his conduct over the last two years, his use in the unit, the fact that the unit still has confidence in him; he is in a unit with which he performs his duties as a Forces member without problems; he is deployed with this unit; and over the last two years, there were no other incidents that occurred in different circumstances or even in circumstances similar to those of this case, so the Court finds that this sub-criterion has been met.

[12] Regarding public confidence in the military justice system, I would like to quote from *J.V. c R*, 2008 QCCA 2157, more specifically, paragraph 7, in which the concept of "the public" is discussed, and I quote:

> [TRANSLATION]
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> This public knows the law and is, as Justice Chamberland writes, [TRANSLATION] "familiar with all the ins and outs of the matter": *R c Doe*, REJB 1997-03809 (C.A.), and, as Justice Fish, then at the Court, wrote, "fully appreciative of the rules applicable under our system of justice": *Pearson c R.*, AZ-90011560. This public is therefore able to form a considered opinion with full knowledge of the facts of the case and the applicable law, an opinion that is not shaped by passion but by reason.

[13] It is true that the offence of which Private Déry was found guilty by this Court is an offence that is nevertheless serious and that objectively is punishable by a maximum sentence of 10 years' imprisonment. On the other hand, as was noted by his counsel,

this was an isolated incident, one that was unusual and that clearly has not reoccurred over the last two years. The sentence that the Court has imposed on Private Déry is a short term of imprisonment, 30 days. Compared with 10 years, this is very short. Would not serving his sentence cause the public confidence with regard to the nature of the offence and the circumstances in which it occurred, cause the public to lose confidence in the military justice system? I find that it would not, if we look at the circumstances of the case, because it is isolated, I think that, as I said a bit earlier, the question of serving the sentence must be weighed against the right to appeal against a court's errors. And if the latter right is to be given true effect in the circumstances of this case, I find that it is important that it be given effect, because public confidence would be undermined if, on the contrary, the Court did not allow the applicant's application.

[14] The whole point of bringing an appeal would become almost moot if the Court kept the applicant in prison for a period of 30 days, and the right to appeal would still be there, but what would be the point, exactly, of this right in the circumstances. This is, however, a first conviction, and with all the elements that have been presented to the Court, I think that the public would be reasonably informed in the circumstances, knowing all the ins and outs of this case, and confidence in the military justice system would be lost if the applicant remained in detention to suffer or serve his sentence.

[15] Therefore, in these circumstances, I conclude that the applicant, Private Déry, has shown on a balance of probabilities that the interests of the public or the Canadian Forces do not demand his detention or his imprisonment. I should also note that Private Déry has read the recommendation of his chain of command in his unit to the effect that he be released from the Canadian Forces. I have no idea when that will take effect, but it gives an idea of where things are heading. So, this is an additional factor that indicates the public interest does not require his detention or imprisonment. And I am reminded of the decision of the Court Martial Appeal Court in *Wilcox*, in which the Appeal Court wrote that if someone is to be released or has been released from the Canadian Forces, there is even less interest in keeping this person incarcerated because it is not up to the Canadian Forces to do so. It may well be, and this is a hypothetical possibility, but a rather strong one, that Private Déry may be released in the very near future, and this is another factor in favour of the third criterion that has been entered in evidence. This fact was entered in evidence and accordingly only confirms my finding.

[16] Therefore, I allow the application, but obviously on condition that Private Déry undertake, sign an undertaking that includes the following conditions:

a) remain under military authority, unless the Canadian Forces order his administrative release;

b) surrender himself into custody when directed to do so;

c) abstain from communicating, directly or indirectly, with the complainant;

d) notify the Officer Commanding, 2 Military Police Platoon-Petawawa, of any change of address, even in the event of my administrative release from the Canadian Forces; and

e) refrain from consuming alcoholic beverages.

**FOR THESE REASONS, THE COURT**

[17] **ALLOWS** the application.

[18] **ORDERS** that the applicant be released on condition that he sign the Form of Direction and Undertaking containing the conditions that I have set out in my decision.

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**Counsel**:

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