Citation: *R. v. Petty Officer 1st Class A.E. Libby*, 2007 CM 4025

Docket: 2006105

STANDING COURT MARTIAL
CANADA
NOVA SCOTIA
CANADIAN FORCES BASE HALIFAX

Date: 30 August 2007

PRESIDING: LIEUTENANT-COLONEL J-G. PERRON, M.J.

HER MAJESTY THE QUEEN
v.
PETTY OFFICER 1ST CLASS A.E. LIBBY
(Offender)

SENTENCE
(Rendered Orally)

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[1] Petty Officer 1st Class Libby, the court has found you guilty of charges number one, three, and four, and has directed a stay of proceedings for charge No. 2. More specifically, you were found guilty of one charge of public mischief for having lied to a member of the military police in an attempt to divert suspicion from yourself and you were found guilty of two charges of stealing gasoline from the Canadian Forces. The value of this gasoline was $313.05. I must now impose a fit and just sentence.

[2] In determining the appropriate sentence, the court has considered the circumstances surrounding the commission of these offences, the mitigating and aggravating circumstances presented by your counsel and by the prosecutor, and the representations by the prosecution and by your defence counsel, as well as the applicable principles of sentencing. Those principles of sentencing, which are common to both courts martial and civilian criminal trials in Canada, are founded on the need to protect the public, and the public, of course, includes the Canadian Forces.

[3] The primary principles are the principles of deterrence, that includes specific deterrence in the sense of deterrent effect on you personally, as well as general deterrence; that is, deterrence for others who might be tempted to commit similar offences. The principles also include the principle of denunciation of the conduct and,

last but not least, the principle of reformation and rehabilitation of the offender. The court must determine if protection of the public would best be served by deterrence, rehabilitation, denunciation, or a combination of those factors.

[4] The court is required, in imposing a sentence, to follow the directions set out in paragraph (2) of article 112.48 of the Queen's Regulations and Orders for the Canadian Forces which obliges it in determining a sentence to take into account any indirect consequences of the finding or of the sentence and impose a sentence commensurate with the gravity of the offence and the previous character of the offender.

[5] The court has considered the guidance set out in sections 718 to 718.2 of the *Criminal Code of Canada*. The court must also impose a sentence that should be the minimum necessary sentence to maintain discipline. The court must remember that the ultimate aim of sentencing is the restoration of discipline in the offender and in military society.

[6] The court has also been guided by the provisions of sections 114, 130, 139, and 175 of the *National Defence Act* in its determination of the lawfully permissible sentence in this case. Only one sentence is imposed upon an offender, whether the offender is guilty of one or numerous offences, and the sentence may be composed of more than one punishment.

[7] The prosecution suggests that the principles of denunciation and of general and specific deterrence are the prime factors that apply in this case. The prosecution has provided this court with one case in support of its submission that the minimum sentence in this matter is a reduction in rank. I understand from the prosecutor's submission that this reduction should be to the rank of petty officer 2nd class. Your defence counsel asserts that a sentence of a severe reprimand and a fine in the amount of $1,000 would represent a fair and just sentence in this case. Your counsel suggests that this fine should be paid at a rate of $250 per month.

[8] I have reviewed Exhibits 14 to 23 in great detail. I have also considered the submissions of your defence counsel and of the prosecutor. The offences of stealing unleaded gasoline from the Canadian Forces involved a certain level of premeditation and represent a clear pattern on your part over a lengthy period of time. Your lies to a member of the military police when you were in the process of stealing some gasoline were made to divert suspicion from yourself. Although no evidence was presented to explain why the fuel card was in your possession, it is clear from the evidence that you did use the lost fuel card to steal gasoline from the Canadian Forces. This fuel card was also used on numerous other times, but it appears that the police investigation could not identify any other user of this fuel card.

[9] I will firstly examine the mitigating factors in this case. You do not have a conduct sheet; thus you are a first-time offender. You have an unblemished career of some 26 years in the Canadian Forces and in the Navy. The personnel evaluation reports, or PERs, filed as Exhibits 17 to 20, are glowing in their evaluation of your performance and of your potential. Your second PER in the rank of PO1 even recommends your promotion and QL7 training ahead of your peers. The letters entered as Exhibit 21 mirror those PERs as to your performance and your potential for promotion in your trade. I note that Lieutenant-Commander Harris' letter basically describes you as he knew you during the period of September 2003 to June 2005. Lieutenant-Commander Harris described you as a "dedicated, reliable, and efficient worker, and nothing to this date has changed that impression." Later he described you "to be very honest. In this role that we provided for him to do he earned and was given a great deal of trust." And later he wrote, "... never once gave us any reasons not to trust him. His reputation was spotless." I note that Lieutenant-Commander Harris did not indicate that nothing had changed this impression of your honesty. I also note that his comments pertaining to your honesty are all in the past tense.

[10] Chief Petty Officer 2nd Class Devenish's letter left me somewhat perplexed. Although it appears to be dated sometime in July 2007, although no exact date is written on the letter, he indicates that he has a "continued presumption of innocence in this case." It would appear this letter was written before the trial. Thus, it would appear that Chief Petty Officer 2nd Class Devenish would not have taken into account the fact that you have been found guilty of these offences when he states that your "integrity, reliability, and honesty are second to none...."

[11] Finally, Lieutenant-Commander Kenneford also provided a character evidence letter. His comments reflect the professional relationship he had with you during the period of late summer 2005 to July 2007. He stated that he never had any reason to question your honesty before this incident. Although Lieutenant-Commander Kenneford did not specifically comment on his present level of trust or confidence in you, he did state he would be able to work with you in leading a department.

[12] The court will not put as much weight on the character evidence contained in these letters as defence counsel would suggest it should. I do not find that these letters demonstrate that you have retained the full confidence of your chain of command. These letters are from officers who were your superiors; they are not from your present chain of command. Lieutenant-Commander Harris' letter does not clearly address his present level of trust in you while Lieutenant-Commander Kenneford's letter indicates that he would be able to work with you in the future. Although it demonstrates a certain level of trust, I do not find that it is the same level as the description of the trust you seemed to enjoy during the period of summer 2005 to July 2007. While some present trust is reflected in this letter, it is not expressed in an emphatic manner. Therefore, while it cannot be said that you have lost the confidence of officers who

know you from past professional contacts, the court does not agree with defence counsel that this evidence clearly demonstrates that you have not lost the confidence of your chain of command since no one from your present chain of command has provided this court with evidence on this issue.

[13] I do not consider the period of time from the date of the offences to the date of trial to be a mitigating factor. I have not been provided with any evidence that would demonstrate that it is unreasonable or excessive or that it has had a negative impact on you or on the discipline onboard HMCS HALIFAX or at CFB Halifax.

[14] I agree with your counsel that you did not use your rank when committing these offences, but I will have more to say about your rank when discussing the aggravating factors.

[15] You exercised your right to silence throughout the police investigation and throughout this court martial. You also exercised your right to plead not guilty. You were found guilty by this court at the end of a complete trial. You have also decided not to testify during the sentencing phase of this court martial. Your counsel asserts that it is your right to do so and that the exercise of this right cannot be considered as a lack of remorse. I fully agree with your counsel that it is your right and that this exercise of your right cannot be viewed in a negative manner and that it cannot be considered as an aggravating factor. Canadian jurisprudence generally considers an early plea of guilty and cooperation with the police as tangible signs that the offender feels remorse for his or her actions and that he or she takes responsibility for his or her illegal actions and the harm done as a consequence of these actions. Therefore, such cooperation with the police and an early plea of guilty will usually be considered as mitigating factors. Although the doctrine might be divided on this topic, this approach is generally not seen as a contradiction of the right to silence and of the right to have the Crown prove beyond a reasonable doubt the charges laid against the accused, but is seen as a means for the courts to impose a more lenient sentence because the plea of guilty usually means that witnesses do not have to testify and that it greatly reduces the costs associated with judicial proceedings. It is also usually interpreted to mean that the accused wants to take responsibility for his or her unlawful actions.

[16] Simply put, an accused that pleads guilty at the earliest opportunity lessens the strain on the judicial resources, and by doing so usually receives a benefit from this cooperation and from the acknowledgement that he or she is taking responsibility for his or her unlawful actions. An accused that pleads not guilty cannot hope to receive the same consideration from the judicial process. This does not mean that the sentence is increased because the accused has been found guilty after pleading not guilty, it only means that his or her sentence will not be affected by the mitigating factor of a plea of guilty.

[17] You lied to a member of the military police when you thought your scheme of stealing gasoline might be discovered. You used a DND fuel card to put unleaded gasoline in your personal vehicle on seven occasions between 22 May 2005 and 17 February 2006. The premeditation and the number of these offences are aggravating factors.

[18] These are not the actions we expect of a senior non-commissioned officer. How can we expect sailors to respect our laws and regulations if our senior non-commissioned officers do not give them the proper example? While these actions seem totally out of character when one examines your PERs and the reference letters, you have not provided the court with any explanations as to why you would commit such actions.

[19] I have reviewed the case provided to me by the prosecutor. The prosecutor asserts that the *Barrette* Standing Court Martial is less serious than the present case because of the mitigating factors in *Barrette*. He suggests that the minimum sentence in this case is a reduction in rank for the same reasons as in the *Barrette* matter. I have carefully reviewed the *Barrette* sentencing decision. Warrant Officer Barrette pled guilty to two charges of stealing medals from the office of the commanding officer of the Governor General's Foot Guards while he served with this unit as a Regular Force support staff. These medals had been earned by two former members of that unit, Captain Edwards and Major McDougall, and kept at the unit. These medals had a much greater value than their insured value. Paragraphs 16 to 18 of this decision describes this value. Sailors, soldiers, and airmen and airwomen understand the true nature of medals, especially medals earned in a theatre of operation. Warrant Officer Barrette's actions, the theft and then sale of these medals, are very serious breaches of fundamental military values. They attacked the core values of our institution and are thus much more serious than the stealing of unleaded gasoline.

[20] I do not agree with the prosecutor that the present case is more serious than the *Barrette* matter. Although Warrant Officer Barrette did plead guilty and did cooperate with the police and he did express much remorse for his actions, he, in fact, committed much more serious offences than Petty Officer 1st Class Libby. Warrant Officer Barrette stole a part of the identity of the Governor General's Foot Guard, he stole a part of their history, and he committed these offences by abusing the confidence the unit had put in him. The consequences of his actions are much more serious than the consequences in this case.

[21] I have also reviewed a number of Court Martial Appeal Court decisions, namely: *Legaarden*, CMAC-423; *Deg*, CMAC-427; *Lévesque*, CMAC-428; and *St. Jean*, CMAC-429. The *St. Jean* decision provides a review of these decisions at paragraphs 24 to 31. While these decisions and the *St. Jean* decision were concerned with the severity of sentence because a sentence of imprisonment had been given in

most cases, they are useful in determining what might be a reasonable and fair sentence in the case at hand.

[22] In *Legaarden* the Court martial Appeal Court quashed a sentence of imprisonment and substituted a severe reprimand a fine of $10,000. Lieutenant-Commander Legaarden had been found guilty of fraud of an amount of US$2,400. In *Lévesque* the Court Martial Appeal Court upheld the sentence of a severe reprimand and a fine in the amount of $4,000 for a non-commissioned member who had to tried to defraud an insurance company of the sum of $35,615. In *Deg* the Court Martial Appeal Court substituted a severe reprimand and a fine in the amount of $5,000 for a lieutenant who had pled guilty to making false entries in documents and stealing while entrusted a sum of $619.

[23] I note that the Court Martial Appeal Court did not impose the more serious punishment of reduction in rank in these cases. In *St. Jean* the accused, a sergeant, pled guilty to a charge of defrauding the Department of National Defence of the sum of $30,835.05. The Court Martial Appeal Court set aside the sentence of imprisonment and imposed a reduction in rank to Corporal, a severe reprimand, and a fine in the amount of $8,000.

[24] Petty Officer 1st Class Libby, please stand up. I believe this sentence must focus primarily on the denunciation of the conduct of the offender and on general and specific deterrence. You stole from the Canadian Forces. The Canadian Forces must trust its members; you, a petty officer 1st class, a senior non-commissioned officer, broke this trust. This conduct must be denounced by the imposition of a sentence that will convey that message. I mention specific deterrence because you have not provided this court with any evidence that demonstrates you fully accept the consequences of your acts and that you take responsibility for your actions.

[25] I have taken into account the following mitigating factors: your excellent performance evaluation reports and that you are a first-time offender. It would appear that these actions, although unexplained, are out of character and—to borrow from the *Legaarden* decision—foolish. The value of the gasoline that was stolen is relatively small.

[26] I have also considered the following aggravating factors: although you did not use your rank to commit these offences, you now have the experience in the Canadian Forces and the rank to know better and we do not expect such conduct from senior non-commissioned officers. These offences were repeated on seven occasions over a period of ten months. You lied to the military police in an attempt to divert suspicion away from yourself.

[27] I have compared this case with the Court Martial Appeal Court decisions that involved somewhat similar offences, although none of the Court Martial Appeal Court decisions can be said to be identical to the present matter. As I have previously stated, I do not believe that the *Barrette* Standing Court Martial can be considered a similar case to this one. Because of the very nature of the items stolen, it is an exceptional case.

[28] Having thus considered the mitigating and aggravating factors, as well as the guidance found in Court Martial Appeal Court decisions, I do not believe that a sentence of reduction in rank is the appropriate minimum necessary sentence to maintain discipline and to restore discipline in the offender and in military society. The court must impose a sentence that will provide a clear message to you and to others that will assist you in taking responsibility for your offences.

[29] Petty Officer 1st Class Libby, the court sentences you to severe reprimand and a fine in the amount of $2,500. The fine shall be paid in monthly installments of $250 commencing on the first day of September, 2007. The proceedings of this Standing Court Martial in respect of Petty Officer 1st Class Libby are terminated.

LIEUTENANT-COLONEL J.-G. PERRON, M.J.

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