

**Citation:** *R. v. Leading Seaman J.R. Lueke*, 2008 CM 3007

**Docket:** 2007-66

**STANDING COURT MARTIAL  
CANADA  
BRITISH COLUMBIA  
CANADIAN FORCES BASE ESQUIMALT**

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Date: 10 April 2008

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**PRESIDING: LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.**

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**HER MAJESTY THE QUEEN**

**v.**

**LEADING SEAMAN J.R. LUEKE  
(Offender)**

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**SENTENCE**

**(Rendered orally)**

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[1] Ex-Leading Seaman Lueke, having accepted and recorded a plea of guilty in respect of the fourth, sixth, seventh, ninth, tenth and eleventh charge, the court finds you now guilty of these charges. Consequently, the court directs that the proceedings be stayed on the fifth charge, considering that this one is alternative to the sixth charge, and that the prosecutor concurred in the acceptance of the plea on that charge. As a matter of information, the court already found you not guilty of the first, second, third and eighth charge, considering that the prosecution had no evidence to present to the court on those charges.

[2] The military justice system constitutes the ultimate mean to enforce discipline in the Canadian Forces, which is a fundamental element of the military activity. The purpose of this system is to prevent misconduct, or in a more positive way, see the promotion of good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusty and reliable manner, successful missions.

[3] As stated by a legal officer, Major Jean-Bruno Cloutier, in his thesis on the use of the section 129 *NDA* offences, the military justice system, "has for purpose to control and influence the behaviours and ensure maintenance of discipline with the ultimate objective to create favourable conditions for the success of the military mission." The military justice system also ensures that public order is maintained and

that those who are subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[4] It has long been recognized that the purpose of a separate system of military justice or tribunals is to allow the Armed Forces to deal with matters that pertain to the respect of the Code of Service Discipline and the maintenance of efficiency and morale among the Canadian Forces. That being said, the punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances. It also goes directly to the duty imposed to the military judge to "impose a sentence commensurate with the gravity of the offences and the previous character of the offender," as stated at QR&O article 112.48 (2)(b). Here, in this case, the prosecution submitted to me that the minimum necessary punishment that I should impose in the particular circumstances of this case would be imprisonment for a period between 14 and 21 days. To the contrary, the defence counsel submitted to me that the most appropriate punishment reflecting the circumstances of this case would be a severe reprimand and a fine over \$1000.

[5] When a military judge must sentence an offender for offences that he has committed, certain objectives must be pursued in light of the applicable sentencing principles. It is recognized that these principles and objectives will slightly vary from case to case, but they must always be adapted to the circumstances and to the offender.

[6] In order to contribute to one of the essential objective of military discipline; that is, the maintenance of a professional and disciplined armed force that is operational, effective and efficient, the sentencing principles and objectives could be listed as: firstly, the protection of the public and this, of course, includes the Canadian Forces; secondly, the punishment and the denunciation of the unlawful conduct; thirdly, the deterrence of the offender and any other persons from committing similar offences; fourthly, the rehabilitation of offenders; fifthly, the proportionality to the gravity of the offence or offences and the degree of responsibility of the offender; sixthly, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; and finally, I shall consider any relevant aggravating or mitigating circumstances relating to the offences or the offender.

[7] In this case, the protection of the public must be achieved by a sentence that would emphasize mainly denunciation and general deterrence. General deterrence means that the sentence imposed should deter not simply the offender from re-offending, but also others in similar situations from engaging, for whatever reasons, in the same prohibited conduct. Also, I have to give some consideration to the principle of rehabilitation in consideration of the particular circumstances of this case.

[8] In arriving at what I consider a fair and appropriate sentence, I have considered the following mitigating and aggravating factors.

[9]

I consider as aggravating:

a. Firstly, the objective seriousness of the offences. The offences you were charged with were laid in accordance with section 129 of the *National Defence Act* for a negligence to the prejudice of good order and discipline, which is punishable by the dismissal with disgrace from Her Majesty's service or to less punishment; with section 124 of the *National Defence Act* for negligently perform a duty imposed upon you, which is also punishable by the dismissal with disgrace from Her Majesty's service or to less punishment; and with section 90 of the *National Defence Act* for being absented without leave, which is punishable by an imprisonment for less than two years or to less punishment;

b. Secondly, the subjective seriousness of the offences. By negligently performing your duty as the access point sentry on HMCS Whitehorse, which was docked along side on a period of four hours, by failing to stay at all time, put potentially some risk on the security of the ship and an additional burden on your shipmates in order to check you and to perform your tasks during that time;

c. The fact that you were an experienced sailor on the ship, well trained and at the rank of leading seaman, put on you the additional burden to lead by example, which you totally failed to do at the time the offences were committed;

d. The fact that you were AWOL on a repetitive manner disclose clearly the total disregard you have for respecting timings given by your chain of command. It also demonstrates the lack of respect you had towards your chain of command and your peers at the time;

e. By your actions concerning this specific matter. You clearly told to all members of your ship that you couldn't be trusted anymore, and it explains well why many people did not want to be closely associated with you in any matter; and

f. The existence of a conduct sheet related to similar offences. This document clearly disclosed, with the addition of the current offences for which you pleaded guilty, that from the time you got on board of HMCS Whitehorse to the time you left that ship, you had great difficulty to behave in an appropriate and expected manner for a leading seaman, and to comply with some basic aspects of military discipline. Your conduct sheet clearly establishes that it is not the first time that you are before a military tribunal for failing to maintain your personal quarters as required, despite the fact that you were clearly warned on that issue, or

for being AWOL.

[10] I consider that the following circumstances mitigate the sentence:

a. Through the facts presented to this court, I consider that your plea of guilty is a clear genuine sign of remorse, and that you are sincere in your pursuit of staying a valid asset to the Canadian community. Moreover, the testimony of Chief Petty Officer Second Class Cotey confirmed to me that you regretted what happened on HMCS Whitehorse, and you personally reaffirmed before me your remorse concerning your behaviour at the time of the incident. The court would not want to jeopardize your chances of success because rehabilitation is always a key element when sentencing a person;

b. Your age and your career potential as a member of the Canadian community. Being almost 22 years old, you have many years ahead to contribute positively to the society in general. Furthermore, you indicated to me your intent to improve your own situation by returning to school in order to get a specific trade. I encourage you to do so if it is really what you want;

c. The fact that your actions and negligence did not result in any regrettable consequences;

d. The fact that you were released from the Canadian Forces in consideration of your conduct. I recognized clearly that this administrative measure do not constitute a disciplinary sanction in itself; however, it had some specific deterrence on you and might have limited general deterrence on others. It also reflects some kind of denunciation in relation to your conduct. You were released under item 5(f), which means, "Unsuitable for Further Service." It is important to know that this specific item, "applies to the release of an officer or a non-commissioned member who, either wholly or chiefly because of ... factors within [beyond] his control, develops personal weaknesses 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," as stated at Table 1 of QR&O Article 15.01;

e. The disciplinary issues you had on HMCS Whitehorse perfectly represent that, and I may infer from the evidence put before me, possessing and using marihuana was not the only problem considered by the chain of command who made the decision to release you from the Canadian Forces;

f. Your record of service in the Canadian Forces. Except for the period you spent on HMCS Whitehorse, your service in the Canadian Forces was good. Moreover, Chief Petty Officer Second Class Cotey described you as a good bowsman despite your attitude problems during the period you were on that ship;

g. The fact that further to your release from the Canadian Forces, you decided, right away, to become a valid asset in the Canadian community, and because of your attitude, you have now the support of your family and your actual employer; and

h. The court considers that the fact that you had to face this court martial has had already some deterrent effect on you, but also on others. The court is satisfied that you will not appear before a court for a similar or any offence in the future. In fact, since your release from the Canadian Forces, two different companies employed you, and there is no evidence whatsoever that disclosed you have had so far the same personal bad attitude as the one you had during your time on HMCS Whitehorse. The court is convinced that you are a good person and have applied what you have learned through this trial and your passage in the Canadian Forces concerning the respect you should have towards any authority at work and in life in general. I am also convinced that you also learned a bit about the fact to deal with things that you do not like or make you very unhappy.

[11] QR&O article 112.48(2)(a) imposes to the court the duty to consider any indirect consequences of a sentence. Then, I must also recognize the direct and indirect consequences that a finding and a sentence will likely have on you, including the impact of any period of incarceration such as the one submitted by the prosecutor and on the potential of your rehabilitation in the Canadian community and the financial aspect.

[12] I would like to highlight the fact that this sentence is about a member having difficulty to comply with some basic military disciplinary rules, which disclosed clearly his lack of dedication. It is not about somebody having difficulty to comply with or to obey orders, which is a different thing. The offender did not plead guilty to an offence of disobeying a lawful command or order, and if it was the intent of the prosecution to approach these incidents with that perspective, it would have been necessary for it to prefer charge or charges to that effect.

[13] Being AWOL does not disclose the inability to follow orders in order to perform a task; however, it discloses the inability to be on time, which could result, when done in a repetitive manner, in a lack of trust by a supervisor towards is or her subordinate to perform any tasks or mission. Ultimately, for a crew on a ship, it could result into its inability to accomplish the mission, ensure security of the ship at sea or

the loss of lives in combat. Before being in any way close to that point, the Canadian Forces decided to release the offender.

[14] I want to reiterate that the chain of command wishes and hopes concerning the consideration that the military judge presiding a court martial should give as to the severity of the sentence have not its place in this court. This Standing Court Martial and the military judge presiding it have all the necessary independence and impartiality to make a decision concerning the severity of the sentence for an offender, and what it is expressed by any representatives of the chain of command before this court on this specific subject does not bind it in anyway. To make it clear, this court does not give any consideration to such specific comment and disregard it.

[15] As stated in *R. v. Gladue*, [1999] 1 S.C.R. 688 at paragraphs 38 and 40, and confirmed by the Court Martial Appeal Court in its decision of *R. v. Baptista* 2006 CMAC 1, the sentence of imprisonment must be imposed only as a last resort. Here, considering all the aggravating and the mitigating factors, I do not see any reason in the specific circumstances of this case that would justify depriving the offender of his liberty.

[16] A fair and just punishment should recognize the gravity of the offence and the responsibility of the offender in the context of this particular case. That being said, the punishment impose by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances. Ex-Leading Lueke, stand up. This court sentences you to a severe reprimand and a fine of \$2,000.00. The fine is to be paid in monthly installments of \$200 each commencing on 1st May 2008 and continuing for the following nine months.

[14] The proceedings of this Standing Court Martial in respect of ex-Leading Seaman Lueke are terminated.

LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

Counsel:

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