Citation: *R. v. Leading Seaman J. D. Dandrade, 2008 CM 3024*

Docket: 200809

STANDING COURT MARTIAL
CANADA
QUEBEC
ASTICOU CENTRE, GATINEAU

Date: 15 October 2008

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

HER MAJESTY THE QUEEN
v.
LEADING SEAMAN J. D. DANDRADE
(Offender)

SENTENCE
(Rendered orally)

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[1] Leading Seaman Dandrade, having accepted and recorded a plea of guilty in respect of the second, third, fourth, fifth and seventh charge, the court finds you now guilty of these charges. The court, having granted leave to the prosecutor to withdraw the first and sixth charge in accordance with subsections 165.12 (2) and (3) of the *National Defence Act* before the reading of the charge sheet, the first and the sixth charge have not to be considered by this court because they are not before it anymore.

[2] The military justice system constitutes the ultimate means 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, Lieutenant-Colonel Jean-Bruno Cloutier, in his thesis on the use of the section 129 of the *National Defence Act* offences, the military justice system, "[h]as 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 been long 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 imposes to the court 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*).

[5] Here, in this case, the prosecutor suggested that this court sentences you to detention for a period of 15 to 20 days. On the other end, your defence counsel suggested that this court suspends the sentence recommended by the prosecutor, and, if this court does not agree, then it sentences you to a shorter period of detention, not exceeding 4 days.

[6] The court has considered those suggestions in light of the relevant facts set out in the Statement of Circumstances and their significance, and I've also considered them in light of the relevant sentencing principles, including those set out in sections 718, 718.1 and 718.2 of the *Criminal Code* when those principles are not incompatible with the sentencing regime provided under the *National Defence Act*. These principles are the following:

> firstly, the protection of the public, and the public includes the interest of the Canadian Forces;
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> secondly, the punishment of the offender;
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> thirdly, the deterrent effect of the punishment, not only on the offender but also upon others who might be tempted to commit such offences;
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> fourthly, the reformation and rehabilitation of the offender;
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> fifthly, the proportionality to the gravity of the offence and the degree of responsibility of the offender; and
>
> sixthly, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

The court has also considered the representations made by counsel, including the case law provided to the court and the documentation introduced.

[7] I must say that considering the nature and the circumstances of the offences, I am of the view that the protection of the public must be ensured by a sentence that would emphasize denunciation, specific and general deterrence. It is important to say that 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.

[8] Here, the court is dealing with two offences for disobedience to a lawful command of a superior officer and three offences of absence without leave throughout a period of 15 days in October 2007. They are very serious offences committed on a short period of time while you were on an important career course or just after. However, the court will impose what it considers to be the necessary minimum punishment in the circumstances.

[9] In arriving at what the court considers a fair and appropriate sentence, the court has considered the following mitigating and aggravating factors.

[10] The court considers as aggravating:

a. The objective seriousness of the offences. The offences you were charged with are pure military offences that were laid in accordance with section 83 of the *National Defence Act* for disobedience to a lawful command of a superior officer, and with section 90 of the same *Act* for absence without leave. The first offence is punishable by the maximum of imprisonment for life or to less punishment, and the second offence is punishable by the maximum of imprisonment for less than two years or to less punishment.

b. The subjective seriousness of the offences. In order to express your disagreement to your instructor, you decided that not obeying orders, or not showing up when requested would be appropriate in the circumstances. The repetitive nature of the offences, the very military nature of them, and the presence of premeditation are aggravating factors that the court must consider. Being an experience sailor, having worn the rank of master seaman at some point in time in your career, should have told you that such conduct was more than inappropriate. You demonstrated clearly a lack of integrity and reliability.

c. The fact that you have a conduct sheet. It disclosed that you had some disciplinary issues, and, more obviously, an attitude problem between 2003 and 2005. Even though you were reduced to the rank of able seaman, you did not disclose the proper attitude when you were confronted and asked to attend compulsory remedial in 2007 in order to succeed on your course. In fact, you decided to adopt the same course of conduct as you previously did and which brought you before this court today.

[11] The court considers that the following circumstances mitigate the sentence:

a. through the facts presented to this court, the court also considers that your plea of guilty is a clear genuine sign of remorse and that you are very sincere in your pursuit of staying a valid asset to the Canadian Forces and the Canadian community. It disclosed the fact that you're taking full responsibility for what you did. Also, the court would not want to jeopardize your chances of success, because rehabilitation is always a key element when sentencing a person;

b. the fact that you recognize, in your testimony today, that your way to do things when you have some disagreement with the chain of command is not appropriate, and, despite the fact that you did not mention that you regret anything, you acknowledge the fact that you did not have a proper conduct. Also, you did recognize that you do not fit anymore in the military environment and that it is time for you to move on to something else;

c. the fact that you decided on your own to solve your personal problems by consulting an addiction counsellor and by taking care of your personal financial issues;

d. your age and your career potential as a member of the Canadian society. Being 34 years old, you have many years ahead to contribute positively to the society in general;

e. the fact that you had to face this court martial. It has had already some deterrent effect on you and also on others. The court is satisfied that you will not appear before a court for a similar or any offence in the future;

f. the fact that some administrative measures have been taken, so far, in regard of your conduct. Even though they can not be considered as a punishment, the court considers that it may have some specific and deterrent effects on those who would be tempted to have the same kind of conduct.

[12] Concerning the fact for this court to impose a sentence of incarceration to Leading Seaman Dandrade, it has been well established by the Supreme Court of Canada decision in *R. v. Gladue*, [1999] 1 S.C.R. 688 at paragraphs 38 and 40, that incarceration should be used as a sanction of last resort. The Supreme Court of Canada specified that incarceration under the form of imprisonment is adequate only when any other sanction or combination of sanctions is not appropriate for the offence and the offender. This court is of the opinion that those principles are relevant in a military justice context, taking in account the main differences between the regimes for punishment imposed to a civilian tribunal sitting in criminal matters and the one set up in the *National Defence Act* for a service tribunal.

[13] This approach was confirmed by the Court Martial Appeal court in *R. v. Baptista*, 2006 CMAC 1, at paragraphs 5 and 6 where it was said that incarceration should be imposed as a last resort.

[14] Here, in this case, considering the nature of the offences, which are pure military offences *per se*, the circumstances they were committed, the applicable sentencing principles, the aggravating and the mitigating factors mentioned above, I conclude that there is no other sanction or combination of sanctions other than incarceration that would appear as an appropriate punishment in this case. On that issue, the court notes the agreement of both counsels.

[15] As the criminal justice system in Canada has its own particularities, like the conditional sentence regime which is different from the probationary measures but constitutes, nevertheless, a punishment of incarceration with specific applications, allowing the offender to serve his sentence in the community in order to combine the objectives of punishing and correcting him at the same time, the military justice system does have, as a tool, the punishment of detention, which seeks to rehabilitate service detainees by re-instilling in them the habit of obedience in a structured military setting through a regime of training that emphasizes the institutional values and skills that distinguish the Canadian Forces member from other members of society. Detention may have an important deterrent effect without stigmatizing a military convict to the same degree as military members sentenced to imprisonment, as it appears from the Notes added to articles 104.04 and 104.09 of the QR&O.

[16] According to Warrant Officer Matteau, who testified as the person in charge of all custody areas at the Canadian Forces Service Prison and Detention Barrack

unit in Edmonton, military members sentenced to imprisonment are incarcerated in a different wing from those who are sentenced to detention. Prisoners don't receive any pay, contrary to detainees. However, both categories of inmates are going through the same first stage while they are serving their incarceration time, which is a reinforced-disciplinary stage that may last between 14 to 20 days. Based on that common way to serve time in jail, the defence counsel would like this court to conclude that detention is the equivalent of imprisonment. However, the court is unable to reach such conclusions, because, as stated earlier, a military member sentenced to imprisonment is stigmatized in a different way then the one sentenced to detention. That approach was also confirmed by Warrant Officer Matteau who told the court that both categories of inmates are exposed to different programs during their time in jail. Those who are there for detention will be reinserted in the military environment very quickly, and those who are there for imprisonment may be reinserted into the civilian life. Finally, the defence counsel, himself, concluded in his final address to the court that he would rather serve a period of 4 days' detention instead of 4 days of imprisonment. He then implicitly recognized that there is a difference.

[17] To conclude, in facts and in law, detention and imprisonment in the military justice system are two different things.

[18] Concerning the offender in this case, I do not see why detention would not be appropriate. Even though it was indicated to the court that he will be released from the Canadian Forces probably by the end of this year, he will stay for some time and it would not be bad if some basic military principles and values are re-instilled in him for his remaining period in the Canadian Forces. Additionally, it will serve as a general deterrent effect for those who would be tempted to take such approach as a proper conduct in the Canadian Forces.

[19] Concerning the length, having balanced all the aggravating and mitigating factors, the court considers that detention for a period of 10 days would be sufficient in the circumstances. It would meet the required sentencing principles and objectives, as well as maintaining discipline and confidence in the administration of military justice. I would say, in addition, that the evidence before me does not provide me with compelling reasons that would allow me to suspend such a period of detention.

[21] Leading Seaman Dandrade, please stand up. Therefore, the court sentences you to detention for a period of 10 days. The sentence was passed at 5:20 p.m., on 15 October 2008.

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

Counsel:

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