Citation: *R. v. Leading Seaman J. D. Dandrade, 2008 CM 302*5

Docket: 200809

STANDING COURT MARTIAL
CANADA
QUEBEC
ASTICOU CENTRE, GATINEAU

Date: 16 October 2008

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

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

DECISION ON AN APPLICATION BY THE OFFENDER TO BE RELEASED PENDING APPEAL
(Rendered orally)

---

[1] Leading Seaman Dandrade, the applicant in this procedure, was sentenced yesterday, at 1720 hours, to detention for a period of 10 days by a Standing Court Martial presided by me. He applied to this court for release pending appeal, pursuant to section 248.1 of the *National Defence Act*, at 1750 hours. The parties agreed to proceed with the hearing yesterday evening and I decided to provide my decision this afternoon, so that explains our presence here today.

[2] The hearing was conducted pursuant to QR&O article 118.04. The evidence on this hearing consisted of the application for release pending appeal, signed by the applicant, RPA-1, and the testimony of Leading Seaman Dandrade.

[3] In order for this court to direct that the applicant be released pending appeal, he must establish, on a balance of probabilities, each and every one of the following conditions in accordance with section 248.3 of the *National Defence Act*:

he intends to appeal;

if the appeal is against sentence only, that it would cause unnecessary hardship if he were placed or retained in detention;

he will surrender himself into custody when directed to do so; and

that his detention is not necessary in the interest of the public or the Canadian Forces

[4] There is no provision in the *National Defence Act*, contrary to the *Criminal Code*, that in the case of appeal on the sentence, or release pending appeal, when a person appeals on sentence only, that he or she establish that the appeal has some merits. It is not the case under the *National Defence Act*.

[5] Despite the fact that the applicant never mentioned in his testimony that he intends to appeal, I have no difficulty to conclude that further to his written application for release pending appeal that was presented to the court, such intent could be inferred from that document.

[6] I am also satisfied, on a balance of probabilities, that the applicant will surrender himself into custody when directed to do so. It is true that the offences on his conduct sheet and the ones he pleaded guilty to refers to a lack of integrity and reliability; however, he clearly stated in court that he will do so and that he is ready to report himself to any MP detachment after he is released from the Canadian Forces.

[7] I am satisfied, on a balance of probabilities, that the detention of the applicant is not necessary in the interest of the public and the Canadian Forces, considering the circumstances of this case and the nature of the offences to which he pleaded guilty.

[8] However, no evidence whatsoever was adduced by the applicant to satisfy this court, on a balance of probabilities, that it would cause an unnecessary hardship if he was retained in detention. It belongs to the applicant to establish that his detention would cause an unnecessary hardship. It is not for the military judge to look for the necessary evidence in order to grant such application.

[9] On the unnecessary hardship issue, I would adopt the position of Chief Military Judge Dutil, in the court martial of *Sergeant Nadeau* in December 2003, when dealing with the exact same issue, he said:

> The issue here, this morning, as I was saying, is whether or not it would cause unnecessary hardship if the accused was placed or detained in imprisonment. The term "unnecessary hardship" is not defined in the *National Defence Act*, and it's not defined, either, in the regulations. The Concise Oxford Dictionary defines unnecessary as simply "more than necessary." Hardship is defined as "the hardness of fate or circumstance," as well as "severe suffering or privation."
>
> I understand from these terms that the term "unnecessary hardship" means severe suffering or privation which is more than required in the circumstances, and implies an irreparable harm. In other words, it means more than simply having to undergo imprisonment pending an appeal through severity of

> punishment. While incarceration is hardship in itself, it cannot, in my view, be described as unnecessary hardship unless other factors bear upon it.

[11] The fact that the applicant would have served the entire sentence could not be retained as causing unnecessary hardship to the applicant. To the contrary, it is necessary to remind people here that the defence counsel, himself, suggested to the court on sentencing procedure that incarceration was adequate in the circumstances of this case and the court should consider suspending it or making it shorter. The applicant, himself, said to the court during his testimony on sentence that he was ready to serve his time.

[12] I would also add that in *R. v. Garneau*, 39 W.C.B. (2d) 402, the Quebec Court of Appeal adopted the same reasoning for the same procedure, but under the item concerning "detention not necessary in the interest of the public".

[13] Here, in this case, there is no evidence of any hardship that would be caused to the applicant. Nothing was adduced by him in order to tell the court what would be the consequences on him if he was still detained.

[14] The applicant has not proved to me, on a balance of probabilities, that it would cause unnecessary hardship if he were placed or retained in detention. Consequently, the application is denied.

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

Counsel:

Major S. MacLeod, Regional Military Prosecutions Central
Counsel for Her Majesty the Queen

Lieutenant-Commander J.C.P. Lévesque, Directorate of Defence Counsel Services
Counsel for Leading Seaman Dandrade