Citation: *R. v. ex-Ordinary Seaman S.M. Mueller,* 2004 CM 50

Docket:S200450

STANDING COURT MARTIAL
CANADA
BRITISH COLUMBIA
CANADIAN FORCES BASE ESQUIMALT

Date: 24 November 2004

PRESIDING:COLONEL K.S. CARTER, C.M.J.

HER MAJESTY THE QUEEN
v.
ex-ORDINARY SEAMAN S.M. MUELLER
(Accused)

SENTENCE
(Rendered verbally)

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[1] Ex-Ordinary Seaman Mueller, please stand. The court having accepted and recorded your plea of guilty to charge number two on the charge sheet, the court finds you guilty of that charge. The court is now at a stage of determining an appropriate sentence and in regard to that matter the court has considered the evidence, both documentary and the testimony that you presented, as well as the submissions of both of the counsel.

[2] The principles that the court follows are those that have been set out by counsel and they apply both to courts martial and to criminal courts in Canada. These are: protection of the public; punishment and denunciation of the offender and the offence; deterrence, both general and specific; and also, where applicable, reform and rehabilitation. In addition, Queen's Regulations and Orders, article 112.48, imposes on the court an obligation to take into account any indirect consequence of any sentence it imposes and requires that the sentence must be commensurate with the gravity of the offence and the previous character of the offender. The punishment must be the minimum required to restore discipline. In many cases to restore discipline in the offender, though not, as you will understand in this particular case, but always to restore discipline in the unit and the Canadian Forces as a whole. Discipline is still an applicable consideration even when the offender is no longer serving. Discipline is a quality which is required by all CF members for prompt obedience to lawful commands. This

prompt obedience, not unthinking obedience but conscious and willing compliance, is indispensable for operational efficiency. Members of the Canadian Forces must be disciplined not only for the efficiency of the Canadian Forces but for the safety of their colleagues, and ultimately, in many cases, themselves. They must also be disciplined because the Canadian Forces can and does require them to do things which are dangerous to themselves, personally, and which would not be something that individuals would necessarily choose to do if they put self-interest before service.

[3] The court has considered the facts here very carefully. You have pled guilty to one charge of absence without authority for a period of one hour. It is fair to say that the evidence before the court shows that you had a short career in the Canadian Forces and a long conduct sheet. You've been convicted of seven absence without leave offences in six disciplinary proceedings, all of which, until this time, were summary trials; two of which were before a delegated officer and four of which were before your commanding officer. And your conduct sheet, essentially, discloses the following; that you were absent without leave on the 25th of September, 2002, for a period of four hours and twenty-five minutes and received a $150 fine and 14 days confinement to barracks. You were absent without leave on the 16th of January, 2003, for a period of five hours and forty-five minutes and you received a punishment of $300 fine and 14 days CB. You were absent without leave on the 30th of May, 2003, for a total of 47 hours and 46 minutes and you received a sentence of 21 days confinement to barracks and a fine of $600. On the 17th of June, 2003, you were absent without leave for two hours and thirty minutes and you received the sentence of a fine of $650 and five days confinement to barracks. On the 19th of August, 2003, you were absent without leave for 24 hours and received a sentence of a $625 fine and 10 days confinement to barracks. And on the 30th of January, 2004, and the 3rd of February, 2004, you were absent for a total of 53 hours and 9 minutes and you received the sentence of 5 days detention and a $700 fine.

[4] As the court has indicated, the offence here is one of absence without leave for a period of one hour. The court has looked at the previous character that has been disclosed to it in the documents and in your testimony and also your current circumstances. The evidence before the court shows that you have longstanding drug and alcohol abuse problems and you joined the Canadian Forces apparently during the only period of remission that you had during your life. You joined the Canadian Forces in 2002 at the age of 36, enrolling on the 21st of February, 2002, with your basic training commencing on the 4th of March, 2002. You completed this successfully on the 9th of May, 2002 and you were then posted to Esquimalt to undergo trades training. During your time in Esquimalt you lived in the Nelles Block which, from your perspective, was not an ideal situation given your own particular challenges. So you arrived in Esquimalt on the 10th of May, 2002, according to the documents the court has before it.

[5] On the 25th of September, 2002, as the court indicated, there was the first absence without leave offence where you received a $150 fine and 14 days confinement to barracks. In January, 2003, you were apparently diagnosed as abusing drugs and alcohol. On the 16th of January, 2003, the second offence of absence without leave of five hours and forty-five minutes occurred. On the 30th of January, 2003, it was recommended that you attend addiction rehabilitation. On the 31st of January, 2003, you obtained your non-commissioned member's basic environment sea qualification. On the 25th of February, 2003, you refused the addiction treatment. On the 30th of May, 2003, you were absent without leave for approximately two days. On the 17th of June, 2003, you were absent without leave for approximately two hours and thirty minutes. On the 19th of August, 2003, you were absent without leave for 24 hours; one day. On the 10th of September, 2003, you were put on counselling and probation for drug misuse for a period of 12 months and on the 18th of September, 2003, you were put on counselling and probation for absence without leave, for a period of six months. Although it was not stated before the court it is evident that neither of these were completed successfully.

[6] On the 25th of September you began a residential course at Edgewood Addiction Centre which ran until the 19th of November, 2003. During that time you were prescribed a drug called Trazodone, which, among its effects had that of being a depressant. From December 2003 and in January 2004, according to the statement of circumstances, you visited the medical clinic, the MIR on a regular basis. On the 12th of February 2004, you were recommended for release due to academic failure. Sometime in early February it is evident from the statement of circumstances that for a two-day period you were using marijuana and cocaine. In addition, in this time frame, there is an indication you had some incident or something similar which resulted in some concussion. Also, as it is set-out in the statement of circumstances, in early February of 2004, you went to the medical clinic with seizures which was subsequently diagnosed in March of 2004 as being the result of cocaine withdrawal. In addition, in February, 2004, you made a large number of visits to the MIR for various minor ailments. On the 20th of February, 2004, you tested positive for cocaine use. In April, 2004, you were diagnosed as suffering from hives and rashes and you were prescribed two drugs independently, both of which had sedative side effects. You were still taking the Trazodone.

[7] On the 13th of May, 2004, you went to the MIR complaining of being unable to sleep and was then prescribed a fourth sedative drug, Naproxine. You were, in addition, given the day off. So, at that point in time you had four prescriptions, all of which had, from the evidence before the court, some sedative effects. You set the alarm that evening for getting up on the 14th of May, 2004, and you also asked another person to wake you up. However, on the 14th of May, 2004, you were not at work at 0730 hours. At approximately 0800 hours, a work colleague came over to wake you up and you apparently got up and reported to your place of duty by 0830 hours. You then went

to the MIR again and was given, at that time, 11 days excused duty. Six days later, on the 20th of May, 2004, an RDP, Record of Disciplinary Proceedings was signed. On the 1st of June, 2004, you elected court martial. On the 7th of June, 2004, the Commandant recommended a court martial and on the 21st of June, 2004, you were released under item 5(f) with condition C, which indicated that no matter what the circumstances were, the Canadian Forces never ever wanted to benefit from your services again.

[8] On the 20th of July, 2004, the charge sheet in this matter was signed. On the 27th of August, 2004, the convening order was signed, and on the 23rd of November, 2004, your court martial began. You pled guilty to the second charge, you were found guilty of that charge today and yesterday the court found you not guilty of the first charge.

[9] During the time frame June/July 2004, you made two applications for employment, one, rather surprisingly, to the commissionaires. In addition, you indicated that the beginning of November you began a well-paying job at approximately $65,000 a year as CEO and general manager of a line painting firm and that you were hired by your friend into this position. You also indicated to the court that currently you are not using drugs and alcohol.

[10] The submissions of the prosecution are that seven days detention is an appropriate sentence but only if it's suspended and for this they rely on something that is called the jump principle and the court will talk a little bit about that later. In essence, your last sentence was five days detention, and as set-out in your conduct sheet, a fine of $700. The conclusion is that that was not sufficient to deter you and that it is necessary to go higher. The prosecution has identified the aggravating circumstances as primarily your conduct sheet, and the mitigating circumstances as a plea of guilty, the medical treatment you were undergoing and the addictions that you were treated for. The prosecution indicated that the main aim here should be general deterrence, and in particular, it emphasized that you should not be seen to escape punishment because you elected court martial and then were subsequently released.

[11] Your defence counsel has indicated that, in essence, the aggravating factors that the court should consider are the same; that is, your conduct sheet and the mitigating factors that he listed were: the late guilty plea; your difficulties, as he described them, in adapting to military life; your health issues and your addiction to drugs. Your defence counsel indicated that a custodial sentence was appropriate but that it should not disrupt your reintegration into military??? life.

[12] The court accepts that legally detention can be imposed on a former member of the Canadian Forces, however, given the purpose of the sentence of detention, which is set-out in Note A to QR&O 104.09, those purposes and aims can rarely be met in the situation of a former serving member and are certainly not met in this

situation. Therefore, if the court accepts the submissions of your counsel that a custodial sentence is appropriate, the only custodial sentence the court would consider appropriate would be imprisonment. However, although the court has heard both counsel say that a custodial sentence should be imposed, although they use those very words, at the same time both of them have said equally vehemently that a custodial sentence should only be imposed if, effectively, it's not imposed; that is, if it's suspended. Neither of them have argued, and specifically the prosecution has said that a custodial sentence, detention, that was carried out, is not appropriate from it's point of view.

[13] The court would state that section 139 of the *National Defence Act* which sets out the sentences that are available to a court martial does not include sentences of suspended detention or suspended imprisonment, and the court has considered the case of *R. v. Castillo*, 2003 Court Martial Appeal Cases 6, which discusses the issue of suspension. The court reads that case as indicating that detention is a potential punishment, however, that in considering whether or not to suspend the detention, the court should only look at appropriate considerations not inappropriate considerations. In this particular case the court's approach has been that detention; that is, detention that would be carried out must be warranted by the gravity of the offence and the circumstances of the offender as set-out in QR&O 112.48, and the court, again, would reiterate that neither counsel has actually submitted that that is the case here.

[14] If the court found that detention was appropriate, then the court might, in some circumstances, decide it would be appropriate to suspend. The kind of situations where courts decide that suspension is appropriate include things such as the impact on an individual. For example, if an individual would lose employment if a sentence was not suspended might be a consideration, though the court would stress that is not the evidence before it in this case. If a person was medically unsuitable to undergo incarceration that might be a reason. If there was a compassionate reason such as a spouse being terminally ill, that too might be a reason to suspend. That is, suspension is usual where a punishment is warranted but a particular circumstance, usually a current situation, makes the imposition of that appropriate sentence not in the interests of society.

[15] There was some mention of sentences and punishments. What the court would indicate is it imposes a sentence and that sentence is the punishment. There may be other items that are included in punishments, consequential ones such as DNA orders and weapons prohibition orders. Those are not applicable in this situation but in other situations they may not be part of the sentence but might well be part of the punishment that resulted.

[16] The court has considered your regressive???(impressive) conduct sheet and the fact that the last offence was for a period of 54-plus hours and that both counsel

have argued that there was and is no evidence before the court that any mitigating factors were applied or known in imposing the sentence and that sentence was five days detention plus a $700 fine. The court has considered very carefully whether detention, and it would again reiterate that is detention, not suspended detention, is warranted by the nature of the offence here or the need for deterrence. The court would indicate it does not see that detention is warranted by the nature of the offence. There is a difference in the scale of the offence. Both counsel have argued that there are significant mitigating factors surrounding the commission of this particular offence, in particular extenuating medical circumstances. In addition, the court is not satisfied that detention is required as a general deterrent. Although detention certainly always serves as a general deterrent, suspended detention does not necessarily have that same effect. So the court is satisfied in this situation that it is not necessary to impose detention.

[17] The court has reviewed the case law that was presented by the prosecution in its further submissions, in particular the case of *R. v. Whittaker*, 2001 Alberta Judgements Number 1356, a decision of Veit, V-e-i-t, J. There the jump principle is set-out as progressive sentencing; that is, lighter sanctions are tried first and then heavier sanctions later. It goes on to say when imprisonment is a sanction then longer terms are usual for each subsequent conviction. The court would indicate that that may be usual but that is not required. In addition, the court would point out that detention is not an equivalent of imprisonment. They are different sentences and they are different in nature and purpose. Although both of them have a restriction on liberty, they are not the same sentence.

[18] The court has considered very carefully if that jump principle would cause it to impose either dismissal or imprisonment which are the two more serious sentences. Although dismissal would seem to be attractive if combined with a large fine, the court is satisfied that in these particular circumstances it is not necessary given the release item under which you have been released; that is, the court is satisfied that it would serve as no greater general deterrent. In terms of imprisonment, and that is actual imprisonment, the court, in light of the mitigating circumstances, is satisfied that that is not the minimum punishment that needs to be imposed here. As the court has indicated, it does not find detention is appropriate.

[19] As a consequence, the court is going to impose on you a fine in the amount of $1200. If you seek to become bondable in the future and need to obtain a pardon for this offence, you will find that it takes you three years after the sentence has been completed. That means after the fine has been paid in full before you can seek a pardon. The fine can be recovered from you as a debt due and owing, either by garnishing wages or by a lien against property, if that is necessary.

COLONEL K.S. CARTER, CM.J.

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