

Citation: *R. v. Ordinary Seaman J.D. Durante*, 2009 CM 1014

Docket: 200925

**STANDING COURT MARTIAL
CANADA
NOVA SCOTIA
HALIFAX**

Date: 6 October 2009

PRESIDING: COLONEL M. DUTIL, C.M.J.

HER MAJESTY THE QUEEN

v.

**ORDINARY SEAMAN J.D. DURANTE
(Offender)**

SENTENCE

(Rendered Orally)

[1] Ordinary Seaman Durante, having accepted and recorded a plea of guilty in respect of the second charge and directed a stay of proceedings on the first charge, this court finds you guilty of the second charge for an offence under section 86 of the *National Defence Act*, that is, fighting with a person subject to the Code of Service Discipline.

[2] It is now incumbent upon this court to determine a sentence, and this is not an easy task. As stated by the prosecution, crafting an appropriate sentence is more an art than a science. It must always be understood and emphasized that the purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The very nature of the offence created under section 86 of the *National Defence Act* serves that purpose directly, in making a service offence, quarrels and disturbances between service personnel.

[3] In determining sentence, the court has considered the circumstances surrounding the commission of the offence as revealed by the Statement of Circumstances filed by the prosecutor, the documentary evidence provided to the court and the testimonies of Leading Seaman Warford as well as the testimony of Ordinary Seaman Durante. This court has examined the evidence in light of the applicable principles and objectives of sentencing, including those set out in sections 718, 718.1 and 718.2 of the *Criminal Code*,

when they are not incompatible with the sentencing regime provided under the *National Defence Act*. The court has also considered the representations made by counsel and the direct and indirect consequences that the finding and the sentence will have on the offender. However, the punishment to be imposed by the court should constitute the minimum necessary intervention that is adequate in the particular circumstances to maintain discipline and meet the interests of military justice.

[4] In summary, the facts of this case disclose that:

The offender was 22 years old at the time of the offence, whereas the victim was 26 years old. Ordinary Seaman Durante, who had enrolled in 2007, was present in Norfolk, Virginia as part of the HMCS CHARLOTTETOWN ship crew. Leading Seaman Warford was a member of the HMCS TORONTO, also present in the port of Norfolk in preparation of a naval exercise.

On Saturday, 22 November 2008, Leading Seaman Warford left the ship with younger sailors who were in Norfolk for the first time. After dinner and several alcoholic drinks, Leading Seaman Warford attended, with his younger colleagues, at a country bar where they drank a couple more drinks. He further agreed with his colleagues to move to Bar Norfolk because his colleagues wanted to discover this particular venue. The Bar Norfolk was located inside a shopping mall.

They arrived at that bar around midnight. Ordinary Seaman Durante ended up in the same bar at roughly the same time, but with two of his colleagues from HMCS CHARLOTTETOWN. It was the first time that Ordinary Seaman Durante was in a foreign port on a ship. During that evening, they all had consumed alcohol prior to their attendance at the bar. Ordinary Seaman Durante and Leading Seaman Warford did not know each other prior to that evening. They were both intoxicated, but Leading Seaman Warford's level of impairment was, undoubtedly, much higher than that of Ordinary Seaman Durante. In his testimony, Ordinary Seaman Durante minimized his level of impairment, stating that he was not intoxicated that night, despite having had approximately four drinks throughout the evening. I accept his evidence to mean that he was not highly intoxicated, but that he was not sober.

The evidence reveals that, while in the bar, the two men had a brief encounter. For reasons still unknown, Leading Seaman Warford started making aggressive comments to Ordinary Seaman Durante and implicitly inviting him to fight. Ordinary Seaman Durante responded in kind. The bouncers of the bar had to intervene to separate them. Shortly after, they

both met again at the coat check. Leading Seaman Warford uttered more aggressive comments again to the offender. They left the bar separately.

Once outside the mall, Ordinary Seaman Durante and his friends had plans to go to another bar. As he was waiting for a taxi where his friends had left momentarily, Ordinary Seaman Durante saw Leading Seaman Warford approaching with his own friends. As they made eye contact again, Leading Seaman Warford rapidly approached towards the offender. Ordinary Seaman Durante thought that Leading Seaman Warford wanted to continue the argument. Leading Seaman Warford had nothing in his hands, but was "egging" Ordinary Seaman Durante on. The offender repeated several times to Leading Seaman Warford to back off and leave him alone with no success. The victim continued to advance and was again warned several times by the offender to stay away from him. As he continued to approach, Ordinary Seaman Durante expressly warned Leading Seaman Warford that if he got closer, he would hit him.

Ordinary Seaman Durante described, that at that time, he felt anxiety and fear. As Leading Seaman Warford made a final step towards him, Ordinary Seaman Durante aimed at and swung his fist directly in the face of the victim. Leading Seaman Warford fell on the pavement and struck his head. The offender left quickly fearing reprisals from Leading Seaman Warford's colleagues and was unaware of the state of the victim. Leading Seaman Warford suffered significant injuries. As a result of the single blow, he was maintained in a medically induced coma at the Norfolk Hospital and released three to four days after. He was repatriated to Canada as a result of his injuries.

Leading Seaman Warford testified that the medical staff informed him that he suffered a cracked skull, accompanied with brain haematoma. For several months, he had to take painkillers to fight severe headaches and could only perform light duties. As a result of the incident, he missed the opportunity to attend at his scheduled QL5 training and was delayed six months. He further testified that he has now resumed normal activities, except that he can no longer or cannot at this time participate in any contact sport.

Leading Seaman Warford is currently attending at his QL5 training. This is a two-year programme, which requires two to three hours of home studies every night and a high level of concentration. Leading Seaman Warford testified that he felt that he had difficulty to sustain a high level of concentration on his course, but he could not indicate whether his situation was attributable, even partially, to his head injuries suffered as a result of his altercation with the offender. Leading Seaman Warford was charged

and convicted of an offence under section 97 of the *National Defence Act*, Drunkenness, as a result of the incident. He was sentenced to a fine of \$400 and six days of confinement to ship or barracks.

Ordinary Seaman Durante enrolled in 2007. He has been on a PAT Platoon for approximately two years. He is still waiting to participate in a QL3 basic trade qualification course, which as a result of the incident and the pending the outcome of this trial, was delayed. His participation in that course was delayed so far.

[5] When a court must sentence an offender for an offence 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 both the circumstances of the offence and of the offender. In order to contribute to the maintenance of a professional and disciplined armed force and proper administration of military justice, the sentencing principles and objectives could be listed as:

First, the protection of society and this includes the Canadian Forces;

Second, the punishment and the denunciation of the unlawful conduct;

Third, the deterrence of the offender and other persons from committing similar offences;

Fourth, the separation of offenders from society, including from members of the Canadian Forces where necessary;

Fifth, the rehabilitation of offenders;

Sixth, the proportionality to the gravity of the offence and the degree of responsibility of the offender;

Seventh, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

Eighth, the sentence must promote a sense of responsibility in offenders and the acknowledgment of the harm done to the victims;

Ninth, an offender should not be deprived of liberty if less restrictive punishment or combination of punishments may be appropriate in the circumstances; and

Finally, the court shall consider any relevant aggravating or mitigating circumstances relating to the offence or to the offender.

[6] The court believes that a proper and fit sentence in a case such as this one must firstly emphasize general deterrence and the denunciation of the conduct. To a lesser degree, it must personally deter the offender of repeating this type of conduct, but it shall promote a sense of responsibility and acknowledgment by Ordinary Seaman Durante of the harm done to Leading Seaman Warford. However, the sentence must assist in the rehabilitation of the offender who is still a very young adult and first-time offender.

[7] It must be understood that the use of violence is not a proper method to deal with personal disputes or conflicts in any circumstances. In the context of Canadian Forces, public brawling between members of our Forces cannot be condoned or tolerated. It affects cohesion, morale and discipline. When committed in foreign countries, it reflects poorly on the state of professionalism and discipline of our entire Forces.

[8] In this case, the court considers aggravating:

First, the fact that your state of sobriety was higher than the victim. According to your testimony, you had a clear judgment and would have reacted in the same fashion if you had nothing to drink that night. This was not a brawl between two drunks. You reacted in a very immature way. You may have been provoked and reacted with anxiety, but you could have avoided this situation altogether as your judgement was not significantly impaired, if at all.

Second, the serious injuries suffered by Leading Seaman Warford. Your counsel argued that the state of intoxication of the victim may have caused or contributed to the fall. You said that you were not intoxicated; if so, you deliberately hit a drunk person. It is even more blameable. The consequences of your single punch are yours. You are immensely lucky that the consequences were not fatal. If it would have been the case, you would have faced significantly more serious charges.

And third, the fact that you were involved in an incident that took place in a foreign country. This situation discredits the reputation of the Canadian Forces as a disciplined and professional armed force.

[9] However, the court considers the following elements to mitigate the offence:

First, your plea of guilty which I consider to be a genuine indication of accepting responsibility and remorse in light of your apology to the victim. By pleading guilty, you have saved the Canadian Forces of

significant financial and human resources expenses. In particular, members of the court martial panel did not have to travel to Halifax as well as several prosecution witnesses from across the country.

Second, the absence of a previous disciplinary or criminal record.

Third, your financial situation as provided in Exhibit 3 and explained during your testimony.

Fourth, the fact that you have been prevented or precluded to attend at your QL3 course and delayed by at least six months. The pending legal proceedings have already had a negative impact on your career in the Canadian Forces.

And fifth, the limited amount of violence involved in the altercation and the extensive level of provocation displayed by the victim.

[10] Counsel for the prosecution and for the defence mostly agree on the sentence that this court should impose. They both recommend that the sentence should be composed of a severe reprimand and a fine. The prosecution recommends that the sentence should also be accompanied with the punishment of confinement to ship for a period of up to 1 November 2009. Counsel for the prosecution suggests that the seriousness of the offence and the circumstances justify a fine of \$3,500. Counsel for the defence submits that the fine should not exceed \$1500 payable over a period of 10 months at a rate of \$150 per month.

[11] Although counsel did not make a joint recommendation on sentence, I interpret their submissions to mean that they both agree that this court should not impose a punishment of last resort which is a period of imprisonment or detention in the circumstances. Despite the fact that you were clearly provoked and threw only one punch at the victim, I believe that a period of detention similar to the period of confinement to ship awarded to Leading Seaman Warford, which is a period of six days, could have been a fair and adequate punishment in the circumstances.

[12] I also believe that the disciplinary aspect of the punishment of confinement to ship or barracks would achieve, in the particular circumstances of this case, the similar objective of re-instilling in the offender the Canadian Forces institutional values and skills if combined to a severe reprimand and a significant fine. Such reasoning must be shared by the prosecution in order to explain their recommendations. However, the punishment of confinement to ship or barracks is subject to specific limitations under the Queen's Regulations and Orders, article 104.13, of the Canadian Forces.

[13] As a minor punishment under Queen's Regulations and Orders, a court martial may impose confinement to ship or barracks, subject to the conditions prescribed in the

table to article 108.24 (*Powers of Punishment of a Commanding Officer*). In other words, a court martial can only impose such minor punishment if it would have been available to a commanding officer presiding at a summary trial. The punishment of severe reprimand is available exclusively to a superior commander in the Table to article 108.26 (*Powers of Punishment of a Superior Commander*). It may be accompanied by a fine. A commanding officer does not have jurisdiction to award the punishment of severe reprimand. Therefore, the court martial cannot accompany to the punishment of severe reprimand, the punishment of confinement to ship or barracks. It is also fair to note, that if a commanding officer does impose the punishment of reprimand, a lower punishment, that officer can only accompany that punishment with a fine. Therefore, the recommendation of the prosecution would amount to an illegal punishment.

[14] I have stated earlier that the sentence should assist in the rehabilitation of Ordinary Seaman Durante. One of the direct consequences of the sentence imposed by this court relates to the period of eligibility that must elapse before an application for a pardon may be considered under the *Criminal Records Act*.¹ The magnitude of the fine sought by the prosecution would extend that period of eligibility to five years. That is a period similar to an offender punished to detention for more than six months, dismissal from Her Majesty's service or imprisonment for more than six months. I find that this would be disproportionate in the circumstances. Therefore, I consider that the fine should not exceed \$2,000 and reduce the period of eligibility to three years.

[15] Therefore, Ordinary Seaman Durante, this court sentences you to a severe reprimand and a fine of \$2,000. The fine will be payable at the rate of \$150 per month for a period of 12 months, commencing on 15 October 2009, and a last and final installment of \$200 payable on 15 October 2010.

COLONEL M. DUTIL, C.M.J.

COUNSEL

Captain T.E.K. Fitzgerald, Canadian Military Prosecution Service Counsel for Her Majesty the Queen

Lieutenant(N) M.P. Létourneau, Directorate of Defence Counsel Services
Counsel for Ordinary Seaman J.D. Durante

¹ R.S.C. 1985, c. C-47.