Citation: *R. v. Ex-Leading Seaman C.W. McLennan*, 2004CM49

Docket: S200449

STANDING COURT MARTIAL
CANADA
BRITISH COLUMBIA
CANADIAN FORCES BASE ESQUIMALT

Date: 5-6 October 2004

PRESIDING: LIEUTENANT-COLONEL M. DUTIL, M.J.

HER MAJESTY THE QUEEN
v.
EX-LEADING SEAMAN C.W. MCLENNAN
(Accused)

SENTENCE
(Rendered orally)

---

[1] Having accepted and recorded your plea of guilty on the second charge, this court finds you guilty of that charge and direct that the proceedings on the 1st charge be stayed.

[2] The punishment that this court will impose is what the court considers to be the minimum punishment required to maintain discipline and administer justice. However, it is always important to bear in mind that sentencing is an individualized process and that the punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances.

[3] In determining sentence, the court has considered the circumstances surrounding the commission of the offence as revealed by the statement of circumstances read by the prosecution, mitigating and aggravating evidence presented during the sentencing hearing, including the testimony of Ex-Leading Seaman McLennan. The Court has also considered, for the purposes of the sentence, representations made by counsel and relevant case law provided to the Court. The Court has also considered any direct and indirect consequences that the findings and the sentence will have on Ex-Leading Seaman McLennan.

[4] The principles to be used in considering what should be an appropriate sentence generally relate to the following: firstly, the protection of society including the Canadian Forces; secondly, the punishment of the offender; thirdly, the deterrent effect of the punishment, not only on the offender but also upon others who might be tempted to commit such offences; thirdly, the denunciation of the conduct; and fourthly, the reformation and rehabilitation of the offender.

[5] The prime principle is the protection of society. The court must determine if that protection would be best achieved by deterrence, denunciation, rehabilitation or punishment or by a combination of two or more of those principles.

[6] Counsel before the court agree that the Court should impose a sentence that highlights the principle of general deterrence. I agree. However this case involves one single transaction, that is "making the false entry in the document." At any time a CF member commits an offence in providing false information to the Canadian Forces, for whatever use this information is required, that person breaches the trust vested on him or her. This type of breach of trust cannot, in the court's view, be compared to the type of breach of trust that was discussed by the Court Martial Appeal Court in cases of fraudulent acts and stealing offences such as in *Deg, Legaarden, Vanier, Saint-Jean* or *Lévesque*. These cases should also not be used outside their proper context. As stated by Justice Létourneau in *R. v. Saint-Jean,* at para 22:

> A breach of that faith by way of fraud is often very difficult to detect and costly to investigate. It undermines public respect for the institution and results in losses of public funds. Military offenders convicted of fraud, and other military personnel who might be tempted to imitate them, should know that they expose themselves to a sanction that will unequivocally denounce their behaviour and their abuse of the faith and confidence vested in them by their employer as well as the public and that will discourage them from embarking upon this kind of conduct.

[7] Although the offender was charged with a fraudulent act such as making false pretenses and obtaining a benefit under section 130 of the *National Defence Act* contrary to paragraph 362(1)(a) of the *Criminal Code,* which is punishable by imprisonment for a period of 10 years and that he was charged with an offence of receiving, under section 115 of the *National Defence Act*, that is another offence against property and property rights which is punishable by a maximum of seven years imprisonment, Ex-Leading Seaman McLennan was not convicted of those offences and for the attached conduct flowing from these charges. The Court is dealing with a single transaction of making a false entry in a document. It is fair to say that convictions on the three charges before the court would have provided the Court with the entire legal context and foundation, not only the factual context, to punish the offender using the principles and guidance provided by the CMAC in *R. v. Saint-Jean*. This is simply not the case. The prosecution concurred in the acceptance of the plea of guilty on the second

charge knowing that its decision would lead to a stay of proceedings on the first charge. The prosecution was not forced to concur. The prosecution could have decided to call its case with regard to the third charge, that is receiving property obtained by the commission of a service offence in an amount of approximately 20 875 dollars. It decided not to do so. Its decision caused the court to find the accused not guilty of that offence. It is not for this court to question the prosecutorial discretion in making difficult and important decisions, but as the common expression says: "You can't have your cake and eat it to." One must bear in mind that the sentence must fit the crime and the offender. The crime here is making a false entry in a document that was required for official purpose. The court cannot sentence the offender for any other crime that he could have been found guilty based on the statement of circumstances prepared as a result of a guilty plea on one single incident.

[8] In determining sentence the court has considered several mitigating and aggravating factors. I will start with the aggravating factors:

> One, the objective seriousness of this offence and the prescribed maximum punishment. This offence is serious. Section 125 of the *National Defence Act* provides that a person found guilty of that offence is liable to imprisonment for a term not exceeding three years or to less punishment.
>
> Second, the fact that as a result of your false entry in the Post Living Differential Request-Authorization form, you received a benefit during a lengthy period, that is over three years, that cost the Canadian Forces over 20 000 dollars. Based on the evidence before the Court, there is no doubt that your action in making the false entry in the document was deliberate and deceitful. The Court considers this an aggravating factor only to the extent that your false entry caused the Canadian Forces to act on the information provided.
>
> Third, your rank and experience in the Canadian Forces. It is common knowledge that the more experience you have, the more is expected of you. Integrity and honesty is amongst these expectations.

Now turning to the facts that the Court considers to be mitigating in the circumstances:

> The first one is the fact that you pleaded guilty to the offence after having collaborated fully with administrative and police authorities during the investigation related to the offence.

Second, the fact that you have made full restitution to the Canadian Forces for the amount that you improperly received as post living differential benefit for which you were not entitled.

Third, your social, economic and family situation.

And fourth, the fact that you had no prior disciplinary or criminal record prior to this day.

[9] One should not forget that this sentence will have consequences on your life well beyond the specific punishment. Whether or not your item of release from the Canadian Forces may be affected as a result of this conviction is totally speculative. However, your conviction will carry a consequence that is often overlooked, specially when the offender maintains his or her employment in the Canadian Forces and that consequence is that you will now have a criminal record at a time of your life where you now have a young family and are commencing or embarking on a new career. This is not insignificant.

[10] For these reasons, this Court sentences you to a reprimand and a fine in the amount of $1500.

LIEUTENANT-COLONEL M. DUTIL, M.J.

Counsel:

Captain K.A. Reichert, Regional Military Prosecutions Western.
Attorney for Her Majesty The Queen
Major L. Boutin, Directorate of Defence Counsel Services.
Attorney for Ex-Leading Seaman C.W. McLennan