

**Citation:** *R. v. Private J.D.A. Nicholson*, 2009 CM 1015

**Docket:** 200949

**STANDING COURT MARTIAL  
CANADA  
NEW BRUNSWICK  
CANADIAN FORCES BASE GAGETOWN**

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**Date:** 30 November 2009

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

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**HER MAJESTY THE QUEEN**

**v.**

**PRIVATE J.D.A. NICHOLSON  
(Offender)**

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**SENTENCE  
(Rendered Orally)**

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[1] Private Nicholson, having accepted and recorded your plea of guilty in respect to the first, third, fourth, and fifth charge, the court finds you guilty of these charges and directs a stay of proceedings on the second charge. The third charge refers to an absence without leave under section 90 of the *National Defence Act*, whereas the first, fourth, and fifth charge refer to an offence under section 101.1 for failures to comply with conditions imposed by a custody review officer given under Division 3 of part 3 of the *National Defence Act*.

[2] The prosecution and defence counsel have made a joint submission on sentence. They recommend that this court sentence the offender to dismissal from Her Majesty's service.

[3] In support of their recommendation, I must say that counsel have provided this court with very extensive and most complete submissions. Although the court is not bound by the joint recommendation on sentence, it should be endorsed unless it would be contrary to public interest or bring the administration of justice into disrepute; and it is not the case here.

[4] It has long been recognized that the purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to discipline, efficiency, and morale of the military. Offences relating to the conduct, such as the one displayed by Private Nicholson, do have an impact on discipline, efficiency, and morale of the military.

[5] That being said, the punishment that is imposed by the court, whether it is a civilian court or a military court, should always constitute the minimum necessary intervention that is adequate in the particular circumstances of a case; and this joint submission respects that principle as well.

[6] The objectives and the principles to be used in considering what should be an appropriate punishment or sentence relates to one or more of the following:

Firstly, the protection of the public, and this includes the Canadian Forces;

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

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

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

Fifthly, the rehabilitation of offenders;

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

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

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

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

[7] In this case, I agree with counsel that the protection of the public must be achieved by a sentence that will emphasize general deterrence and denunciation. It must also reflect the principle of proportionality to the gravity of the offences and the degree of responsibility of the offender.

[8] The prosecution also invited the court, based on the parity principle, to consider the sentence recently imposed on Private Billingsley who was sentenced to imprisonment for a period of 21 days and dismissal from Her Majesty's service for events somewhat related to this case. I agree with this approach.

[9] After reviewing the joint submission in light of all these principles and objectives, I have assessed them in the context of this case as revealed by the Statement of Circumstances and the Agreed Statement of Facts filed before the court.

[10] In a nutshell, the relevant facts of this case are the following:

Private Nicholson was charged for absence without leave from 15 to 24 June 2009, inclusively;

A CO's arrest warrant was issued by Lieutenant-Colonel Foster on 15 June 2009, relating to this AWOL;

On 24 June, he was arrested while in a vehicle in the CANEX parking lot at CFB Gagetown on the above arrest warrant and later released by a CRO, custody review officer, Major Rogers, on conditions, including to remain within the confines of the Province of New Brunswick, to abstain from communicating with Private Billingsley, to abstain from consumption of alcohol or other intoxicating substances, and to obey instructions from persons of authority and uphold good order and discipline;

A summary trial was scheduled for 30 June 2009. It was later changed for 2 July 2009, at 0800 hours, in the CO's office at the Armoured School at CFB Gagetown. Private Nicholson was advised by his chain of command and by his assisting officer of the change of a new trial date;

On Thursday, 2 July 2009, Private Nicholson failed to appear for his summary trial as ordered to do so. In doing so, he failed to comply with a condition imposed under Division 3 of the Code of Service Discipline, a condition of release imposed by the custody review officer on 24 June 2009. This disobedience resulted in a failure by Private Nicholson in upholding good order and discipline. A CO's arrest warrant was issued;

On Friday, 3 July 2009, he was arrested in Halifax at 0400 hours on the CO's arrest warrant. He was severely intoxicated. He had previously been arrested by the Halifax Regional Police for public intoxication and he was being held in cells. He had consumed alcohol that day, and he was transported back to CFB Gagetown and retained in custody until his summary trial the next morning. He was found guilty and he was sentenced to 25 days' detention;

Private Nicholson also did not have a leave pass for the 2nd and 3rd July 2009, or any other authority that would have permitted him to be absent from duty at that time. He was supposed to report for duty at 0800 hours at the Armoured School on 2 July 2009 for a summary trial. He was aware of his conditions of release, but was in Truro and Halifax on 2nd and 3rd July 2009, and he was drinking alcohol at those locations at that time with Private Billingsley; and

Private Nicholson was absent without leave from 2 July 2009, and he remained absent until the next day.

[11] The evidence of this court includes also an Agreed Statement of Facts, which was filed as Exhibit 8, and the court finds extremely relevant the following elements of this document:

On 28 August 2009, Private Nicholson failed to attend the Halifax Provincial Court as directed. He was found guilty in absentia for public intoxication and fined an amount of \$118.50. He was found guilty of the same offence in Truro, Nova Scotia last February;

On 31 August 2009, he was convicted by summary conviction of operating a motor vehicle, having consumed alcohol contrary to section 253(1)(b) of the *Criminal Code of Canada*. He was fined \$1,000 and prohibited from operating a motor vehicle for 12 months;

Private Nicholson is considered, according to this document, a poor performer by his chain of command. His conduct while employed at the Armoured School has been deplorable and his inability to follow orders has made him a sub-standard soldier;

Throughout his short career with the Canadian Forces, he has been an administrative burden to the unit, and thus adversely impacting operational efficiency and trust in the military justice system as an effective means of administering discipline;

On 12 November 2008, he was removed from training from his DP 1 Armoured Crewman course due to unacceptable conduct, namely lying to directing staff;

On 9 July 2009, the Armoured School sent a recommendation for release under 5(d) (*Not Advantageously Employable*), and that was based on Private Nicholson's poor conduct, poor performance, and an admission of drug use in June 2009;

On 21 August 2009, the commandant of the Armoured School presented Private Nicholson with a Notice of Intent to Recommend Release under item 5(d) for breaching his counselling and probation period for continuous misuse of alcohol, and being charged and found guilty of eight offences under the *National Defence Act* during a 12-month time period. Overall, he has been an administrative burden to the Canadian Forces;

On 15 September 2009, the commandant of the Armoured School sent a Notice of Intent to Release Private Nicholson under 5(d), reinforcing the aggravation of the conduct of Private Nicholson since the initial release recommendation of July 2009;

Over the past year, Private Nicholson was placed under strict supervision and consumed much of his supervisor's time. Further, Private Nicholson influences others in the unit to engage in inappropriate behaviour. His actions have caused more disciplinary and morale problems among other members;

Private Nicholson's unit have taken all necessary steps to facilitate medical treatment for him, including access to addictions counselling.

He has, through his lawyer, advised the prosecution of his intention to plead guilty to charges 1, 3, 4, and 5 on 5 November 2009.

[12] I will quickly review or mention the elements or the factors that I consider to be aggravating in this case:

The first one is the seriousness of these offences in the context of military justice. I agree with my colleague, Military Judge d'Auteuil, that the offence of absence without leave goes to the heart of military discipline. Although not the most objectively serious, the context and the circumstances of this offence make it subjectively very serious. With regard to the offence under 101.1 of the *National Defence Act*, the failure to respect conditions imposed on a pretrial custody review, not only does it demonstrate a lack of military discipline and obedience, but it constitutes a blatant disregard for the rule of law and legal processes;

The second most aggravating factor is the absolute disrespect and failure to abide the basics of military discipline as demonstrated by the Statement of Circumstances and the Agreed Statement of Facts. Military service in our country is voluntary. Your behaviour clearly demonstrates that you did not want to accept your self-imposed responsibilities;

The third aggravating factor is your extensive conduct sheet, which is living proof that you simply do not want to accept the basic tenets of military discipline. You have been in the Canadian Forces shortly over a period of two years, and you managed to generate an enormous amount of disciplinary and administrative problems without any improvement, despite serving significant periods of detention. You do not learn from your mistakes.

[13] There are no significant mitigating factors in this case with the exception of your plea of guilty to the charges before the court and your young age. Your counsel has mentioned that a sentence of dismissal carries with it the consequence of an annotation to your release certificate. Well, he is right.

[14] A sentence of dismissal is a very serious punishment. As he said, a person sentenced to dismissal is further released under item 1(a) under the Table of Article 15.01 of the Queen's Regulations and Orders for the Canadian Forces. It carries the mention, "Dismissed for misconduct." It is certainly not something that is a good start for a young man of 19 years of age who is about to embark on a new civilian career without a high school degree.

[15] But there is more to it, the sentence of dismissal will also have other consequences as well on the offender's release benefits. For example, he will not be entitled to severance pay. This is significant when the offender's rate of pay is in the vicinity of \$46,000 per year. He will also not be entitled to any relocation benefits.

[16] It is obvious that you did not listen to anyone during your stay in the Canadian Forces. I wish I knew why you joined if you didn't want to be a valuable member of the institution in the first place. You just gave up a well-compensated and challenging profession, filled with first class people. I would like to know how many persons in this country are earning \$46,000 per year with a grade 10 education. Your military career is about to be over, but your life just starts. You are at a crossroads and only you can decide what you want to be in your life. So far, I don't like what I see, and I sincerely hope that you become a responsible young adult and seek help as required, but at the end, it is up to you.

[17] Private Nicholson, the court sentences you to dismissal from Her Majesty's service.

[18] The court martial proceedings with regard to Private Nicholson are terminated.

COLONEL M. DUTIL, C.M.J.

COUNSEL

Major J.J. Samson, Canadian Military Prosecution Service  
Counsel for Her Majesty the Queen

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