

Citation: *R. v. Leading Seaman S.W. Donnelly*, 2009 CM 3021

Docket: 200935

**STANDING COURT MARTIAL
CANADA
NOVA SCOTIA
CANADIAN FORCES BASE HALIFAX**

Date: 27 November 2009

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

HER MAJESTY THE QUEEN

v.

**LEADING SEAMAN S.W. DONNELLY
(Offender)**

SENTENCE

(Rendered orally)

[1] Leading Seaman Donnelly, having accepted and recorded a plea of guilty in respect of the second charge on the charge sheet, the court finds you now guilty of that charge. Consequently, considering that the prosecutor informed the court that he concurs in the acceptance of the plea of guilty for this alternative charge that is less serious than the first charge on the charge sheet, and you have pleaded not guilty to the more serious alternative charge, then the court directs that the proceedings be stayed on the first charge. Please, be seated.

[2] It is now my duty as the military judge who is presiding at this Standing Court Martial to determine sentence. The military justice system constitutes the ultimate means to enforce discipline in the Canadian Forces, which is a fundamental element of the military activity. The purpose of this system is to prevent misconduct, or in a more positive way see the promotion of good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusty and reliable manner, successful missions. It also ensures that public order is maintained, and that those who are subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[3] It has been long recognized that the purpose of a separate system of military justice or tribunals is to allow the armed forces to deal with matters that pertain to the respect of the Code of Service Discipline and the maintenance and efficiency of morale

among the Canadian Forces. That being said, the punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances.

[4] Here, in this case, the prosecutor recommends that this court sentence you to detention for a period of 14 days. On the other hand, your counsel suggests that I sentence you to a reprimand and a fine in the amount of \$1,000. The court has considered the submissions made by both counsel in light of the relevant facts set out in the Statement of Circumstances and their significance, and I have also considered the same submissions in light of the relevant sentencing principles, including those set out in section 718, 718.1, and 718.2 of the *Criminal Code*, when those principles are not incompatible with the sentencing regime provided under the *National Defence Act*.

[5] These principles are the following: firstly, the protection of the public, and the public includes the interests of 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; fourthly, the reformation and rehabilitation of the offender; fifthly, the proportionality to the gravity of the offence and the degree of responsibility of the offender; and sixthly, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. The court has also considered the representations made by counsel and the documentation introduced.

[6] I am of the view that the protection of the public must be ensured by a sentence that would emphasize on the principles of denunciation and general deterrence. It is important to say that general deterrence means that the sentence imposed should deter not simply the offender from reoffending, but also others in similar situations from engaging, for whatever reason, in the same prohibited conduct.

[7] Here, the court is dealing with a pure military offence for being absent without leave from your ship, which goes to the heart of military discipline. This type of offence is about the application of the principles of responsibility and integrity for a sailor. Being trustworthy and reliable at all times is more than essential for any mission in an armed force, whatever is the function or the role you have to perform. However, the court will impose what it considers to be the necessary minimum punishment in the circumstances.

[8] In arriving at what the court considers a fair and appropriate sentence, the court has considered the following mitigating and aggravating factors. The court considers as aggravating the objective seriousness of the offence. The offence you were charged with was laid in accordance with section 90 of the *National Defence Act* for being absent without leave. This offence is punishable by imprisonment for term of less than two years or to less punishment.

[9] About the subjective seriousness of the offence, the court considered four things as aggravating facts:

first, your rank and experience. At the time of the offence you had about five years of experience in the Canadian Forces spent in various locations and conditions. Also, you were wearing the rank of leading seaman for about two years, and you were very familiar with the importance of the routine for the ship in port, such as the brow duty;

second, you clearly knew you could and must show up for your duty, but you relied only on your own assessment of the situation, being reckless about the impact on your fellow sailors and on the ship. Clearly, you decided to pass yourself before anything else that morning of 24 January 2009;

third, the fact that you have a conduct sheet for a similar offence;

finally, the length of your absence. Up to the end of your duty you had the opportunity to change your mind, but you never did. It then resulted in having somebody else to take your place at the last minute for almost a period of 24 hours. It means that you were not at your place of duty for most of the time you were supposed to perform.

[10] The court considers that the following circumstances mitigate the sentence:

through the facts presented to this court, the court also considers that your plea of guilty is a genuine sign of remorse and that you are very sincere in your pursuit of staying a valid asset to the Canadian Forces and the Canadian community. It disclosed the fact that you're taking full responsibility for what you did;

the fact that you presented an application on a constitutional issue prior to your plea of guilty does not alter or impact on the significance of it.

the fact that the incident was out of character. You were described by some witnesses as having a lack of enthusiasm for your specific trade, but you were not known as somebody being late, lazy, or not having any consideration for timing. You had good and bad days, and you tried to resolve, by yourself, a situation by making a bad, a very bad, decision. It is clear that you never intended to become a disciplinary or administrative burden for your ship by absenting yourself in a repetitive manner;

the fact that you did the duty watch of the person that replaced you, and the fact that you were put more often on the Bos'n Mate schedule and tasked on lockup duty for the entire week following immediately the incident. Despite the fact

that it is not a punishment in itself, this measure may have some deterrent effect on others who would be tempted to adopt the conduct that you have done;

the fact that you had to face this court martial has had, already, some deterrent effect on you and also on others.

[11] Concerning the fact for this court to impose a sentence of incarceration for Leading Seaman Donnelly, it has been well established by the Supreme Court of Canada decision in *R. v. Gladue*, [1991] 1 S.C.R. 688, at paragraphs 38 and 40, that incarceration should be used as a sanction of last resort. The Supreme Court of Canada specified that incarceration under the form of imprisonment is adequate only when any other sanction or combination of sanctions is not appropriate for the offence and the offender. This court is of the opinion that those principles are relevant in the military justice context, taking in account the main differences between the regimes for punishment imposed through a civilian tribunal sitting in criminal matters and the one set up in the *National Defence Act* for a service tribunal.

[12] This approach was confirmed by the Court Martial Appeal Court in *R. v. Baptista* (2006) C.M.A.C. 1 at paragraph 5 and 6, where it was stated incarceration should be imposed as a last resort. Here, in this case, considering the nature of the offence, the circumstances it was committed, the applicable sentencing principles including sentences imposed on similar offenders for similar offences committed in similar circumstances by military tribunals, the aggravating and the mitigating factors mentioned above, I conclude that there is other sanctions or combination of sanctions other than incarceration that would appear as the appropriate and the necessary minimum punishment in this case.

[13] LS Donnelly, it is clear for the court that you went through a rough time about what you wanted to do with your life. At some point, it impacted on your conduct, your work performance, and your ability to assess properly your responsibilities and duties as a sailor, as a member of HMCS IROQUOIS, and of the Canadian Forces. However, following your meeting with your commanding officer in June of this year, you cleared your mind and since then you have become a valuable asset for your crew and your shipmates, and gave reasons to yourself and probably your daughter, to be proud of what you're doing now as a sailor. I encourage you to continue to do so. However, next time you will face a personal situation where you don't know what you want to do anymore, I suggest that you counsel and discuss the matter before it impacts again on your own conduct. Never forget that on sea or at shore, all the sailors on your ship are relying on each other to perform each task.

[14] Leading Seaman Donnelly, please stand up. This court sentences you to a reprimand and a fine of \$2,000. The fine is to be paid in monthly installments of \$500 each commencing on 1st December, 2009, and continuing for the following three

months. In the event you are released from the Canadian Forces for any reason before the fine is paid in full, the then-outstanding unpaid amount is due and payable the day prior to your release. Please be seated.

[15] The proceedings of this Standing Court Martial in respect of Leading Seaman Donnelly are terminated.

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

COUNSEL

Major A.T. Farris
Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Lieutenant-Commander B.G. Walden
Directorate of Defence Counsel Services
Counsel for Leading Seaman S.W. Donnelly