COURT MARTIAL

Citation: *R v Donald*, 2012 CM 4021

Date: 20121122
Docket: 201216

Standing Court Martial

Canadian Forces Base Valcartier
Quebec City, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Private E.W. Donald, Applicant

Before: Lieutenant-Colonel J-G Perron, M.J.

DECISION RESPECTING AN APPLICATION PURSUANT TO SECTIONS 9 AND 24(1) OF THE *CHARTER OF RIGHTS AND FREEDOMS* TO STAY THE PROCEEDINGS

(Orally)

[1] The applicant, Private Donald, is charged with assault and using provoking speeches and gestures toward a person subject to the Code of Service Discipline, tending to cause a quarrel. The applicant has made an application under subparagraph 112.05(5)(e) of the Queen's Regulations and Orders for the Canadian Forces alleging that he was detained arbitrarily because the military police did not release him from custody as soon as practicable in contravention of his rights under section 9 of the *Canadian Charter of Rights and Freedoms*.

[2] The applicant requests that pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms* the court order a stay of proceedings or in the alternative consider this breach in mitigation of sentence should the applicant be found guilty.

[3] The evidence consisted of the testimony of Private Donald, Lieutenant-Commander Forsyth, Corporal Blanford and Master Corporal Laflamme. The court took judicial notice of the facts and matters contained in Military Rule of Evidence 15. The applicant presented one exhibit and the respondent presented two exhibits.

[4] Firstly, I will review the main facts in this application. Private Donald was a student on the QL3 Medical Technician course at Canadian Forces Base Borden at the time of the alleged offences. During the early evening of 20 January 2011 he was in his room with his room-mate, Private Calpito. During their discussion Private Donald would have waved a knife and pointed a knife in the direction of Private Calpito. Private Calpito would have told Private Donald not to do that and after Private Donald would have done it again Private Calpito would have taken his knife and held it at Private Donald's throat. Somehow Private Calpito cut Private Donald's throat and caused him to bleed. Private Donald was taken to a civilian hospital by another private in a car. The cut was approximately 12 centimetres long and Private Donald received eight stitches.

[5] Corporal Blanford, a member of the Canadian Forces Base Borden MP Detachment, was dispatched to the room. He saw two knifes, one with blood on the blade, and blood on the floor. He spoke with Private Calpito after having read him his rights. Private Calpito was cooperative and described the incident to Corporal Blanford. Corporal Blanford arrested Private Calpito for aggravated assault, put handcuffs on him and had another military police member take him to the detachment.

[6] Corporal Blanford then went to the hospital. After having spoken to the medical staff who had attended to Private Donald he went to see Private Donald. He escorted him to the entrance of the hospital; Private Donald was arrested by Corporal Blanford at 1920 hours on 20 January 2011. Private Donald was brought to the guardroom by Corporal Blanford and committed to the custody of Master Corporal Krull, a member of the Borden CFNIS Detachment at 1942 hours. (See Exhibit M1-4). Private Donald was interviewed by Master Corporal Laflamme, another member of the Borden CFNIS Detachment. He was kept in custody until he was released by a custody review officer at 1430 hours on 21 January 2011.

[7] The relevant provisions of the *Charter of Rights and Freedoms* that apply in this matter are sections 9 and 24(1). Section 9 reads as follows:

> Everyone has the right not to be arbitrarily detained or imprisoned.

Paragraph 24(1) reads as follows:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[8] Liberty is a fundamental right in Canada and members of the Canadian Forces also possess that right. As stated by the majority decision in the Supreme Court of Canada decision of *R v Grant*, [2009] S.C.C. 32 at paragraph 54:

> The s. 9 guarantee against arbitrary detention is a manifestation of the general principle, enunciated in s. 7, that a person's liberty is not to be curtailed except in accordance with the principles of fundamental justice. As this Court has stated: "This guarantee expresses one of the most fundamental norms of the rule of law. The state may not detain

> arbitrarily, but only in accordance with the law" Section 9 serves to protect individual liberty against unlawful state interference. A lawful detention is not arbitrary within the meaning of s. 9, unless the law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9.

[9] Subsection 154(1) of the *National Defence Act* provides that:

> Every person who has committed, is found committing or is believed on reasonable grounds to have committed a service offence, or who is charged with having committed a service offence, may be placed under arrest.

[10] Article 105.01 of the Queen's Regulations and Orders reproduces subsection 154(1) and provides at Note B, that:

> A person who has been or may be charged need not necessarily be placed or retained under arrest. The circumstances surrounding each case should be considered in order to determine whether arrest is appropriate.

[11] Paragraph (a) of section 156 of the *National Defence Act* allows any member of the military police to:

> detain or arrest without warrant any person who is subject to the Code of Service Discipline, regardless of the person's rank ... who has committed, is found committing, is believed on reasonable grounds to be about to commit or to have committed a service offence or who is charged with having committed a service offence ...

[12] Paragraph 2 of section 495 of the *Criminal Code of Canada* reads as follows:

> A peace officer shall not arrest a person without warrant for
>
> (*a*) an indictable offence mentioned in section 553,
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> (*b*) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
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> (*c*) an offence punishable on summary conviction,
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> in any case where,
>
> (*d*) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to
>
> (i) establish the identity of the person,
>
> (ii) secure or preserve evidence of or relating to the offence, or
>
> (iii) prevent the continuation or repetition of the offence or the commission of another offence,
>
> may be satisfied without so arresting the person, and

> (*e*) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

[13] In *R v Gauthier*, [1998] CMAJ No. 4, the Court Martial Appeal Court examined the powers of arrest without warrant of members of the military police granted by section 156 of the *National Defence Act*. It concluded that the exercise of that power of arrest must be justified in the circumstances because the particularly prejudicial nature of this power to an individual's rights and freedoms. The court noted that section 495 of the *Criminal Code* of Canada gives a police officer the power to arrest a person, but also:

> ... prohibits the police officer from doing so if he or she believes on reasonable grounds that the public interest may be satisfied without arresting the person or has no reasonable grounds to believe that the person will fail to attend court. The concept of public interest in this context refers, among other things, to the need to establish the identity of the person and to prevent the repetition or continuation of the offence or the commission of another offence.

[14] The Court Martial Appeal Court then concluded that the requirements governing the power of arrest found in the *Criminal Code* have become minimum requirements for the valid exercise of the power of arrest. (See paragraphs 22 to 26 of the *Gauthier* decision, also see *Corporal Louis v R*, 2005, CMAC 3, at paragraph 7).

[15] The Court Martial Appeal Court noted the requirements governing the exercise of the power of arrest found at section 495 of the *Criminal Code* are only found at section 158 of the *National Defence Act*. Section 158 pertains to the release from custody by the person making the arrest. Article 105.12 of the Queen's Regulations and Orders reproduces subsection 158(1) of the *National Defence Act*. The Note to article 105.12 reads as follows:

> The mere fact that an investigation is not yet complete or the mere possibility of the alleged offender going absent without leave will not normally be considered sufficient reason to hold an alleged offender in custody

[16] Subsection 158(1) of the *National Defence Act* provides that:

> A person arrested under this Act shall, as soon as is practicable, be released from custody by the person making the arrest, unless the person making the arrest believes on reasonable grounds that it is necessary that the person under arrest be retained in custody having regard to all the circumstances, including
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> (*a*) the gravity of the offence alleged to have been committed;
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> (*b*) the need to establish the identity of the person under arrest;
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> (*c*) the need to secure or preserve evidence of or relating to the offence alleged to have been committed;
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> (*d*) the need to ensure that the person under arrest will appear before a service tribunal or civil court to be dealt with according to law;

> (*e*) the need to prevent the continuation or repetition of the offence alleged to have been committed or the commission of any other offence; and
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> (*f*) the necessity to ensure the safety of the person under arrest or any other person.

[17] It is clear from the *Gauthier* decision as well as from Note B to article 105.01 and the Note to article 105.12 that the power of arrest must be exercised carefully and in a manner that will respect the fundamental right that one's liberty is not to be restricted unnecessarily and in an arbitrary manner.

[18] Corporal Blanford joined the military police in 2006. He testified he arrested Private Donald because he was dealing with an incident of an assault with a weapon. During his examination-in-chief he stated that he retained Private Donald in custody because of the seriousness of the offence and his fear that the offence could be repeated if Private Donald was released right away. During his cross-examination he stated the grounds for arrest were the ones listed in the account in writing, Exhibit M1-4, specifically to prevent the continuation of the offence and the safety of the public. At the time he arrested Private Donald he had obtained the following information from Private Calpito concerning the incident: Private Donald had held a knife to Private Calpito's throat; had been aggressive; and that he had slapped Private Calpito in the face, but he had not injured anyone; Private Calpito had cut Private Donald's throat; Private Calpito had tried to help Private Donald after having cut him; they were not pulled apart; Private Perl had taken Private Donald to the hospital.

[19] Corporal Blanford stated the offence was over because Privates Calpito and Donald were in custody. He did not consider not arresting Private Donald. He explained that the CFNIS took precedence over the file because it was an indictable offence. He also explained that it was normal procedure to arrest a person for an indictable offence and to let a custody review officer release the person. During his re-examination Corporal Blanford explained the grounds found in the account in writing. He explained that prevention of the continuation of the offence as Private Donald leaving the hospital to keep fighting. He explained that safety of the public meant that, since he was dealing with a weapon related offence, Private Donald could commit the offence again on someone else or as retaliation. He further stated that the general practice for an indictable offence was to arrest the person and to detain the person until a bail hearing or a hearing before a custody review officer. He also stated that a person should not be arrested if there were no grounds for arrest, no matter the offence.

[20] The court finds Corporal Blanford's explanations confused and confusing. On the one hand he states that it is general practice to arrest someone when dealing with an indictable offence and on the other hand he states a person should not be arrested if there are no grounds for arrest no, matter the offence. Corporal Blanford arrested Private Donald because he suspected he had committed an assault with a weapon. This offence is found at section 267 of the *Criminal Code* of Canada. Section 267 reads as follows:

> Every one who, in committing an assault,
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> (*a*) carries, uses or threatens to use a weapon or an imitation thereof, or
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> (*b*) causes bodily harm to the complainant,
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> is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

[21] Section 267 may be prosecuted as an indictable offence or an offence punishable on summary conviction. Thus, paragraph (2) of section 495 of the *Criminal Code* of Canada would apply to the present situation.

[22] The court finds that Corporal Blanford was merely following the general military police practice of arresting a person suspected of having committed an indictable offence instead of determining whether the arrest of Private Donald was necessary to satisfy the public interest. Corporal Blanford arrested Private Donald at 1920 hours at the hospital in Alliston. He drove Private Donald to the MP Detachment building at Canadian Forces Base Borden, the drive took approximately 10 to 15 minutes. He signed the account in writing, Exhibit M1-4, at 1942 hours. It thus appears it would have taken approximately 7 to 12 minutes to complete this document. The account in writing indicates "aggravated assault – CCC section 268(2)" as the reason Private Donald was arrested by Corporal Blanford and committed to the custody of Master Corporal Krull.

[23] Corporal Blanford testified he had arrested Private Calpito for aggravated assault and Private Donald for assault with a weapon. Is this account in writing simply a copy of the one prepared for Private Calpito? The court will not assume anything since it has not been presented with any evidence concerning Private Calpito's account in writing, but the court does wonder how much attention was given to this important document by Corporal Blanford.

[24] Again, the court finds Corporal Blanford's explanations concerning the decision to retain Private Donald in custody confused and confusing. Corporal Blanford testified he decided to retain Private Donald in custody because of the seriousness of the offence and his fear the offence could be repeated if he was released immediately. He stated during his cross-examination that the offence was over because Privates Calpito and Donald were in custody. The account in writing indicates two grounds: to prevent the continuation of the offence and the safety of the public. He also stated that the general practice for an indictable offence was to arrest the person and to detain the person until a bail hearing or a hearing before a custody review officer. He would have completed the account in writing in a few minutes. It contains an important error; namely, the offence for which Private Donald was arrested. A note can be found at the bottom of the account in writing form used by the CFSTG MP Detachment, it reads as follows:

> "As this account in writing may be the only information available at the time the decision to retain the arrested person in custody is reviewed, these reasons should be given in as much detail as possible having regard to the circumstances, including those set out in paragraph (1) of article 105.12 of the Queen's Regulations and Orders."

[25] Corporal Blanford had been ordered to hand over Private Donald to the CFNIS because the CFNIS assumes the lead in the case of serious incidents; this he did. The evidence before this court concerning the account in writing leads it to conclude that Corporal Blanford did not pay much attention to this document and its significance. This is an important document that is signed by the person making the arrest that it informs the person under arrest, the commanding officer and the person who assumes the custody of that person of the reason or reasons the person is to remain under custody. It is thus obvious why one must take the necessary time and attention when making this important decision and completing the account in writing. The court finds Corporal Blanford did not consider whether the conditions found at section 158 were present to justify the continued detention of Private Donald. The court finds he simply applied the general practice of detaining someone arrested on suspicion of having committed an indictable offence. He also simply transferred the custody of Private Donald to the CFNIS because he had been ordered to do so. He failed to exercise his duty as provided by section 158 of the *National Defence Act*.

[26] Military police general practices or standard operating procedures must respect the law. The *National Defence Act* and the *Queen's Regulations and Orders* provide for specific powers and procedures that must be respected when arresting and detaining a person subject to the Code of Service Discipline. Private Donald's detention following his arrest was arbitrary because Private Blanford did not apply the provisions of section 158 of the *National Defence Act* as was his duty to do so. Private Donald should have been released from custody by Corporal Blanford as soon as is practicable unless Corporal Blanford believed on reasonable grounds that it was necessary that Private Donald be retained in custody having regard to all the circumstances and the criteria found at section 158.

[27] Although Corporal Blanford had committed Private Donald to Master Corporal Krull's custody, it appears Master Corporal Krull was not very involved in this matter. Master Corporal Laflamme was the lead investigator in this file. He was investigating an attempt to commit murder. He initially thought the release from custody would be handled by the civilian criminal justice system because he thought that system was more streamlined than the military system. He later received a telephone call from the CFNIS authorities in Ottawa telling him to keep the case in the military justice system. He would have then prepared the documents for the custody review officer and would have contacted the custody review officer. He left the military police detachment at approximately midnight.

[28] During his cross-examination he admitted that at the time he did not know much of the military custody review process. Master Corporal Laflamme used the term "mili-

tary show cause." He even stated he did not know the military show cause even existed at the time of the beginning of the interview. He had not received any training on the military custody review process. He was investigating an attempt to commit murder, a very serious offence. He did not think a custody review officer could handle such a situation. He stated that, "Considering the severity of the offence the civilian system was more streamlined and faster than the military system in that the matter could be heard the next day in the civilian system." Based on his experience a custody review officer would also be available the next morning and not at night. He decided at approximately midnight to use the military justice system. He stated that, "Knowing what he knows now he would not have proceeded in the same manner then."

[29] Master Corporal Laflamme joined the military police in 2004. He was posted to the CFNIS Detachment in Borden in 2010. It appears from his testimony that he had more training and knowledge in the criminal justice system at the time of the incident than on the Code of Service Discipline. Notwithstanding his lack of knowledge the court finds his explanations perplexing. He states, "He did not even know about the military show cause process" but also tries to justify his initial decision to use the civilian system by stating the custody review officer would not have been capable to deal with such a serious offence and that the civilian system was much faster than the military system. The court does not accept his explanations.

[30] The court has some doubts that Master Corporal Laflamme did in fact contact the custody review officer at approximately midnight on 20 January 2011. Lieutenant-Commander Forsyth was appointed custody review officer sometime after the graduation parade on Friday morning, 21 January. She attended the reception and then signed the course reports for the students. She made her way to the cells at approximately 1200 hours. She released Private Donald at 1430 hours. It appears that Private Donald's company sergeant major would have visited him sometime during the evening of 20 January and he would have informed Lieutenant-Commander Forsyth that members of her company were detained the military police. The court has not been provided any evidence indicating when her unit was notified by the military police of the need of the custody review officer.

[31] Master Corporal Krull was responsible for the custody of Private Donald. Master Corporal Laflamme was leading the investigation. No one seemed to know what to do until approximately midnight on 20 January. Learning on the job while a person is detained is not the best practice. The court is quite surprised by this level of ignorance of the applicable laws and regulations by members of the CFNIS. Master Corporal Laflamme had only been a member of the CFNIS for less than one year when he was assigned that case. It appears a very junior and inexperienced investigator was assigned one of the most serious criminal offences found in the *Criminal Code of Canada*. Private Donald is now charged with simple assault and using provoking speeches and gestures towards a person subject to the Code of Service Discipline, tending to cause a quarrel. These are far from being some of the most serious charges one can find in the *Criminal Code* or the *National Defence Act*.

[32] It would appear from the evidence presented to the court that Master Corporal Laflamme concluded at approximately midnight on 20 January that he would pursue that matter in the military justice system. The court finds that Master Corporal Laflamme had decided that Private Donald would be released on the morning of 21 January or at least would be brought before competent authority for release. That is not his decision to make. The court notwithstanding has not been presented any evidence that would demonstrate that Master Corporal Laflamme's actions were guided by bad faith. Paragraph (1) of section 158.1 of the *National Defence Act* reads as follows:

> The officer or non-commissioned member into whose custody a person under arrest is committed shall, as soon as practicable, and in any case within twenty-four hours after the arrest of the person committed to custody, deliver a report of custody, in writing, to the custody review officer

[33] In accordance with the *National Defence Act*, Master Corporal Krull was responsible for Private Donald's custody. He could not release Private Donald but he had to notify the custody review officer. The court has not been provided much evidence on the role he played in this process. Counsel for the applicant indicated he did not consider there was any bad faith shown by Master Corporal Laflamme but a systemic lack of training. The court does agree that it appears that members of the military police need to improve their level of knowledge of the Code of Service Discipline. The court is also of the opinion that military police practices and procedures might need to be reviewed to ensure they comply with the provisions of the *National Defence Act* and of the *Queen's Regulations and Orders*.

[34] Article 1.04 of the *Queen's Regulations and Orders* reads as follows:

> Words and phrases shall be construed according to the common approved meaning give in the Concise Oxford Dictionary if in English, or in Le Petit Robert if in French, except that:
>
> (a) technical words and phrases, and words that have acquired a special meaning within the Canadian Forces, shall be construed according to their special meaning, and
>
> (b) words and phrases that are defined within QR&O or within the *Interpretation Act* or the *National Defence Act* shall be construed according to that definition.

[35] Article 1.065 of the Queen's Regulations and Orders reads as follows:

> In QR&O
>
> (a) "practicable" shall be construed as "physically possible"; and
>
> (b) "practical" shall be construed as "reasonable in the circumstances".

The *Interpretation Act* and the *National Defence Act* do not define practicable. While the use of the term practicable at issue is found in the *Queen's Regulations and Orders*, the court will nonetheless use this definition to guide itself in deciding this matter.

[36] Considering the facts of this case as presented to the court, the court finds the provisions of section 158.1 of the *National Defence Act* were nonetheless applied in that the custody review officer did receive a report of custody as soon as practicable and within 24 hours.

[37] In *R v Carsosella* [1997] 1 S.C.R. 80, at paragraph 52, Sopinka J writing for the majority states:

> A judicial stay of proceedings has been recognized as being an extraordinary remedy that should only be granted in the "clearest of cases". In her reasons in *O'Connor*, L'Heurexu-Dubé J. stated (at para 82) that:
>
> > It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

[38] I have come to the conclusion that a stay of proceedings is not appropriate in this matter. There is no evidence before the court that demonstrates that the actions of Corporal Blanford and Master Corporal Laflamme have prejudiced Private Donald's right to make full answer and defence. I have not been provided with any evidence that would make me conclude that irreparable prejudice would be caused to the integrity of the military justice system if the prosecution were continued. The decision in this application and a reduction of the sentence will send a clear message that unjustified arrests and detentions in circumstances such as those present in this case will not be condoned by courts martial.

FOR THESE REASONS, THE COURT:

[39] **GRANTS** the application made under paragraph 112.05(5)(e) and the court concludes that the proper remedy in this case is a mitigation of the sentence pursuant to paragraph 24(1) of the *Charter of Rights and Freedoms*.

Counsel:

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