



COURT MARTIAL

Citation: *R v Brinton*, 2013 CM 4021

Date: 20130920

Docket: 201320

Standing Court Martial

Canadian Forces Base Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Leading Seaman D.J. Brinton, Offender

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

REASONS FOR SENTENCE

(Orally)

INTRODUCTION

[1] Leading Seaman Brinton, at the conclusion of a full trial, the court found you guilty of charges number 1 and 2 and ordered a stay of proceedings for charge number 3. The court has found you guilty of two charges laid under section 83 of the *National Defence Act* of having disobeyed the lawful commands of a superior officer. The court must now impose a fit and just sentence.

[2] You were a student on the QL5 course. You had to write an exam for that course on 27 June and on 28 June 2012. You had previously indicated to your superiors that you wished to be excused on one of those days to write a civilian university exam. You were granted two days of sick leave for these two days because a doctor had determined you were unfit to perform your regular duty. The doctor told you to rest at your home, hydrate yourself and take the prescribed medication.

[3] Petty Officer 2nd Class Larouche ordered you to go home and rest. This order imposed a duty onto you to be at your residence for the purposes of resting and recuperating. Petty Officer 2nd Class Larouche was also aware that you were supposed to write a university exam on 27 or 28 June. He also ordered you not to write the university exam. You did not go immediately to your residence but went to the university to write the exam.

GENERAL PRINCIPLES OF SENTENCING

[4] The prosecutor referred to section 203.1 of the *National Defence Act* when suggesting which sentencing principle should be applied by the court. Section 62 of the *Strengthening Military Justice in the Defence of Canada Act*, S.C. 2013, c.24, adds the new section, 203.1 to the *National Defence Act*.

[5] Section 135 of the *Strengthening Military Justice in the Defence of Canada Act* reads as follows:

- (1) Subject to subsection (2), the provisions of this Act, other than subsections 2(2) to (4) and (6) and sections 3, 10, 11, 41 to 45, 106, 109 to 116, 118 to 125 and 132 to 134, come into force on a day or days to be fixed by order of the Governor in Council.
- (2) Sections 19, 68 and 126 to 128 come into force on a day to be fixed by order of the Governor in Council.

[6] The court was not presented with any evidence demonstrating that section 62 has come into force by order of the Governor in Council. A review of both the CanLII and the Justice Canada websites indicates that the *National Defence Act* has not been modified by this section. The court must thus rely on the applicable law and case law when considering the appropriate sentencing principles in this case.

[7] As indicated by the Court Martial Appeal Court (CMAC), sentencing is a fundamentally subjective and individualized process where the trial judge has the advantage of having seen and heard all of the witnesses and it is one of the most difficult tasks confronting a trial judge. (see *R v Tupper* 2009 CMAC 5, paragraph 13)

[8] The Court Martial Appeal Court also clearly stated in *Tupper* that the fundamental purposes and goals of sentencing as found in the *Criminal Code of Canada* apply in the context of the military justice system and a military judge must consider these purposes and goals when determining a sentence. Section 718 of the *Criminal Code* provides that the fundamental purpose of sentencing is to contribute to "respect for the law and the maintenance of a just, peaceful and safe society" by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;

- (c) to separate offenders from society where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

[9] The sentencing provisions of the *Criminal Code*, ss. 718 to 718.2, provide for an individualized sentencing process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender. This sentence must also be similar to other sentences imposed in similar circumstances. The principle of proportionality is at the heart of any sentencing. Proportionality means a sentence must not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence. But a sentence is also a "form of judicial or social censure." A proportionate sentence may express, to some extent, society's shared values and concerns.

[10] A judge must weigh the objectives of sentencing that reflect the specific circumstances of the case. It is up to the sentencing judge to decide which objective or objectives deserve the greatest weight. The importance given to mitigating or aggravating factors will move the sentence along the scale of appropriate sentences for similar offences.

[11] The Court Martial Appeal Court also indicated that the particular context of military justice may, in the appropriate circumstances, justify and, at times, require a sentence which will promote military objectives. But one must remember that the ultimate aim of sentencing in the military context is the restoration of discipline in the offender and in the military society. The court must impose a sentence that should be the minimum necessary sentence to maintain discipline.

[12] Only one sentence is imposed upon an offender, whether the offender is guilty of one or numerous offences, and the sentence may be composed of more than one punishment.

[13] The prosecutor submits that the appropriate sentence in this matter is a reprimand and a fine in the amount of \$3,000. Defence counsel asserts that a reprimand and a fine in the amount of \$800 to \$1,000 would represent the minimum necessary sentence for discipline. She also suggests the fine be paid at a rate of \$200 to \$500 per month.

[14] I will now examine the aggravating and mitigating factors. I have considered the following aggravating factors:

- (a) the offence of disobeying a lawful command of a superior officer is objectively one of the most serious offences under the Code of Service Dis-

cipline since the maximum sentence is imprisonment for life. Subjectively, I also find these offences to be serious. You intentionally disobeyed two orders of your immediate superior because you wanted to do as you pleased;

- (b) in doing so you also abused the sick leave regime. Dr Hache was not convinced you were as sick as you were telling him, but he did give you two days of sick leave based on the information you were providing him. Petty Officer 2nd Class Larouche also put his trust in the doctor's decision to grant you sick leave and he did not question it. You abused the trust we must put in each Canadian Forces member that he or she will only use the medical services and the sick leave regime for their intended purposes and not for personal purposes;
- (c) you do not have a conduct sheet but you did indicate in your statement, found at Exhibit 5, that you had been found guilty of one charge of absence without leave. It would thus appear that conviction was removed pursuant to DAOD 7006-1. Therefore, although you do not have a conduct sheet, I will take into account that you have been previously found guilty of absence without leave. This does demonstrate that you have had problems in the past that are directly linked to self-discipline and the respect of orders. I will give it less weight than I would normally since I do not have any other information on that charge;
- (d) there was some premeditation in the commission of these offences. You had planned on writing the university exam on that day before you went to see Dr Hache. Your actions after the fact are also aggravating. You tried to mislead the investigator by providing a written statement that contained many falsehoods. Also, when asked if you were directed by your divisional staff to go home and not to write any exam you answer "No, not in those words." You also blamed the invigilator for the fact that you had to write your exam on 27 June when you had booked it for that date;
- (e) your actions did have consequences on the QL5 course. The school had to prepare two extra exams just for you and you wrote those exams in July and in September. Also, Petty Officer 2nd Class Larouche testified that, after the date of the offences, he had to deal with another student who indicated he might try to get some sick leave to obtain free time to take care of personal issues. He had to ensure that student understood that this was not the correct way of thinking;
- (f) Petty Officer 2nd Class Larouche testified you put a lot of time and efforts in your university studies and that this had a negative impact on your performance on the QL5 course. He also stated you could do very well when you applied yourself.

[15] I will now examine the mitigating factors in this case:

- (a) you were 36 years old at the time of the offence. You had joined the Canadian Forces in March 2007 and had served for four years in the Canadian Forces. As such, I will consider your relative inexperience as a mitigating factor;
- (b) I have reviewed your Personnel Evaluation Report (PER), Personnel Development Review (PDR) and course reports, found at Exhibits 15, 16, 17, 18 and 22. You were promoted to the rank of leading seaman in March 2011. The PER is for the period 1st April, 2010 to 21 March 2011. I have not been provided with your last two PERs. Your performance is satisfactory and your potential for promotion is average. Your course reports are also good to very good. Generally speaking you appear to be a normal average sailor. I did note in your PDR for the period of 1 April 2009 to 31 March 2010 that it indicates that you should not "take on too many taskings outside the military to avoid being distracted from your career."
- (c) I also note that you have successfully completed four OPME courses during the period 28 December 2011 to 29 May 2012. It does appear that you can succeed when you put your mind to it. What you now need to do is put your mind at being a good sailor. Being a good sailor does not just mean getting good academic results on career courses or other courses. It means showing some self-discipline and respecting orders, rules and regulations.

[16] You wanted to write the exam on 27 June and you had gone to get sick leave since you did not think you would have been otherwise excused from your regular duties as a student on the QL5 course by your chain of command. You abused the trust the medical doctor put in your description of your condition. You abused the sick leave policy to do as you pleased. You tried to blame others. You have never shown any true sign of remorse or that you understand your errors.

[17] You disobeyed two lawful orders intentionally and with some premeditation. I find the disobedience of lawful orders in such a context to be very serious. It demonstrates you did not have any respect for the lawful authority of your superiors and for your duties as a sailor on a career course. You simply put your personal interest before your duties.

[18] I have reviewed the case law presented by both counsel. I find the facts of this case make it more serious than most of the cases presented to the court. I have not been presented any evidence that convinces me that this situation is out of character for you. This sentence must focus primarily on the denunciation of the conduct of the offender and on deterrence, specific and general.

FOR THESE REASONS, THE COURT:

[19] **SENTENCES**, Leading Seaman Brinton, to a reprimand and a fine in the amount of \$3,000. The fine will be paid in monthly instalments of \$300 starting on 15 October 2013.

Counsel:

Lieutenant-Commander D.T. Reeves
Counsel for Her Majesty the Queen

Lieutenant-Commander D. Liang and Major S. Collins, Directorate of Defence Counsel Services
Counsel for Leading Seaman D.J.Brinton