



COURT MARTIAL

Citation: *R. v. O'Toole*, 2012 CM 1018

Date: 20121115

Docket: 201270

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Ordinary Seaman K.G. O'Toole, Offender

Before: Colonel M. Dutil, C.M.J.

REASONS FOR SENTENCE

(Orally)

[1] Ordinary Seaman O'Toole has pleaded guilty to six charges for offences under the *National Defence Act*, namely two counts under section 129 of the *Act* for a conduct and neglect to the prejudice of good order and discipline, two counts under section 90 of the *Act* for absences without leave, and two counts for failure to comply with conditions imposed under Division 3 under section 101.1 of the *Act*.

[2] Counsel have jointly recommended that the court sentence Ordinary Seaman O'Toole to dismissal. The court has expressed its concerns to counsel with regard to the fitness of this proposal in the circumstances of this case. Counsel for the prosecution and defence have reiterated their joint submission. They have expressed the view that their recommendation would achieve the primary objectives of general deterrence and denunciation. They focused their attention to the offences of absence without leave and their duration to argue that their proposal was fit and within the range of sentences for these offences and the fact that Ordinary Seaman O'Toole had turned himself in. For the following reason their proposal may well be within the range of sentences, but the court respectfully disagrees that it would be a fit sentence and that it would not be con-

trary to public interest: the proposed sentence does not adequately take into account another primary and important sentencing objective in this case, namely specific deterrence. This is particularly crucial where Ordinary Seaman O'Toole has repeatedly failed to respect bail conditions imposed by a judicial officer now that he will continue his life in the civilian community.

[3] At the time of the offences, Ordinary Seaman O'Toole was a cook posted to the Base Foods section at Canadian Forces Base Esquimalt. In the early morning of 29 September 2012, there was a disturbance at Ordinary Seaman O'Toole's assigned barrack room at Bernays Block, here on base. The military police attended at the said building to investigate. They found a civilian male, Eric Knoblauch, in Ordinary Seaman O'Toole's barrack room. This person had recently arrived in British Columbia from Manitoba, and he and Ordinary Seaman O'Toole were planning to move into civilian accommodation together. In the meantime, for approximately a week prior to 29 September 2012, Mr Knoblauch had been living with the offender in his single quarters room contrary to Canadian Forces Base Esquimalt Single Quarters Standing Orders, which provides that guests are permitted in single quarters rooms only during visiting hours and that the only personnel allowed to live-in or remain overnight in single quarters are those authorized by the Base Accommodation Officer. Guests are not permitted in single quarters after 2300 hours daily. Mr Knoblauch had not been authorized to remain overnight in single quarters and Ordinary Seaman O'Toole was aware of that. As a result of the disturbance at his single quarters room, Ordinary Seaman O'Toole was arrested by the military police. Later that same morning, he was released from custody by a custody review officer from his unit on conditions, including that he was "to report to Chief Petty Officer 1st Class Ferguson at Nelles Block, room 146, 0800hours Monday, 1 October 2012." On 1 October 2012, Ordinary Seaman O'Toole failed, without lawful excuse, to report to Chief Petty Officer Ferguson as he had agreed to as a condition of his release on 29 September 2012.

[4] Ordinary Seaman O'Toole was scheduled for duty in the Nelles Galley at CFB Esquimalt on the late shift, from 1030 hours to 1900 hours on 1 October 2012. Ordinary Seaman O'Toole had been made aware of this duty and the shift schedule for all cooks had been posted since mid-September in the Nelles Galley in accordance with the galley's standard practice. He had worked his scheduled shift in the galley the day prior, on 30 September 2012; however, Ordinary Seaman O'Toole failed to report for duty at the Nelles Galley as he was required to at 1030 hours on 1 October 2012.

[5] When Ordinary Seaman O'Toole failed to report to Chief Petty Officer 1st Class Ferguson and later failed to report for his duty, his unit initiated their procedure for locating absentees without success, including going to his room. Members of his unit searched the adjacent parking lot, checked the appointment book, called the base medical and dental clinics, local hospitals, and other sections within Base Foods looking for him. None of these measures succeeded to find Ordinary Seaman O'Toole.

[6] At 1120 hours on 1 October 2012, Master Seaman Auer went to Ordinary Seaman O'Toole's single quarters room with the barrack warden, who knocked loudly on

his door and received no reply. As a safety measure and to ensure the welfare of the offender, the barrack warden opened the door of the single quarters room and announced himself. Receiving no response, they entered in the room and found that Ordinary Seaman O'Toole was not there, but they noted that the room was in disarray and that there was significant damage to the room and furnishings. Master Seaman Auer noted that the locker and bed in the room were broken, that there was blood on the wall, and that clothes were strewn on the bed and floor. The barrack warden noted that there were holes and slash marks in the walls throughout the room and in the closet doors and that there was damage to and blood stains on the corner of the closet. He also noted that a "stench of dirty laundry and alcohol filled the room." On looking in the storage locker for the room, Master Seaman Auer found two large garbage bags full of empty alcohol cans and described the smell as horrendous. Ordinary Seaman O'Toole testified that he had collected these empty bottles to collect the deposit money from the liquor store. In addition, a chair in the room was slashed with a sharp object beyond repair and there was a hole in the carpet. The estimated costs of repair or replacement of the damage to the room are approximately \$2,000. Administrative measures are being pursued to recover the costs of these repairs from Ordinary Seaman O'Toole.

[7] The Canadian Forces Base Esquimalt Single Quarters Standing Orders provide that rooms shall be maintained in a clean and orderly manner at all times and that occupants are responsible for the cleanliness of their rooms. This includes the empty bed spaces. All rooms are to be swept out or vacuumed, furniture dusted, beds made and all loose gear stowed before departure from the room. Of course, the state of Ordinary Seaman O'Toole's single quarters room on 1 October 2012 did not meet the standards of cleanliness and order required by the Standing Orders.

[8] Ordinary Seaman O'Toole turned himself in to the military police at the Military Police Unit in Esquimalt at 1257 hours on 2 October 2012. He was arrested at that time for failure to comply with a condition of release and being absent without authority. At 1630 hours on 2 October 2012, he was released from custody on conditions by a custody review officer of his unit, including to remain under military authority; reside in room 407 Bernays Block, 124 Ontario Drive, CFB Esquimalt; report to the Base Duty Officer at 0700, 1800, and 2130 hours daily, commencing on 3 October 2012; attend all scheduled appointments within the Canadian Forces or civilian health care practitioners; and report on time to his scheduled work shifts at Nelles Block Galley.

[9] On 3 October 2012, he was placed on sick leave for seven days, from 3 to 9 October, inclusive. The medical employment limitations form that evidenced this sick leave included a notation that although he was not to be around food handling or preparation, and to minimize contact, he could continue to meet his remaining conditions for release from custody. On 4 October 2012, he failed to report to the duty officer at 0700 hours as required. Later that morning, at 1010 hours, Chief Petty Officer 2nd Class Rogerson called the hotel where Ordinary Seaman O'Toole had previously been staying. He was there and Chief Petty Officer Rogerson spoke to him. Ordinary Seaman O'Toole said that he had tried to report that morning, but that the duty officer was not present when he arrived. He further told him that he would return to the base at that

time and would report to Chief Petty Officer 2nd Class Rogerson. However, he did not report, but later arranged to be picked up at a location in downtown Victoria at 1500 hours by Chief Petty Officer 2nd Class Rogerson. That afternoon he was re-read his conditions of release from custody by the custody review officer and Chief Petty Officer 1st Class Ferguson. Ordinary Seaman O'Toole had secured off-base accommodations prior to being ordered to reside on base and he had maintained that off-base accommodations while residing on base. Therefore, he would spend time at his off-base accommodation during his off time.

[10] On 8 October 2012, Ordinary Seaman O'Toole failed, without lawful excuse, to report to the duty officer in the morning as required. His unit was notified, and initiated the procedures to locate absentees. His room was checked at 0750, 0930, 1200, and 1845 hours by either knocking on the door, or in the case of the check at 0930 hours, by entering. He also failed, without lawful excuse, to report to the duty officer at 1800 hours on that day. On the fourth check of his room, at 1845 hours, Ordinary Seaman O'Toole was found in his room by the Base Duty Officer and the Petty Officer of the Day. He told the duty officer that he had been at the hospital in the morning, but had been back in his room and sleeping since 1030 hours. Later an investigation revealed that he was at a medical appointment in Victoria at 1030 hours on 8 October 2012. The offender's unit was preparing to seek the issue of an arrest warrant during the day on 8 October 2012, and at the time that he was found in his room his commanding officer was en route to the base to consider the matter and issue a warrant, if required. As he was found in his room at that time, he was not arrested for having breached the conditions of his release. Instead, he was again reminded of the conditions of release from custody imposed on him on 2 October 2012.

[11] The next day, Ordinary Seaman O'Toole was placed on sick leave for an additional period of five days. The physician who authorized the sick leave confirmed that Ordinary Seaman O'Toole was medically able to comply with the conditions of his release from custody. Further to Ordinary Seaman O'Toole's own request, on 12 October 2012, a custody review officer amended the conditions of his release, and a new Direction on Release from Custody was issued and agreed to by Ordinary Seaman O'Toole. The main change from the conditions on which Ordinary Seaman O'Toole was released on 2 October 2012 was to reduce the number of times that he was required to report to the Base Duty Officer to once per day, at 0700 hours, in order to allow him to attend evening Alcoholics Anonymous meetings. A further condition was added; that is, Ordinary Seaman O'Toole would abstain from the consumption of alcohol and use only medication as prescribed by a physician.

[12] Despite these changes, Ordinary Seaman O'Toole failed to report to the Base Duty Officer at 0700 hours, on 14 October 2012, as required. He telephoned the duty station at 0658 hours and told one of the duty staff to tell the Base Duty Officer that he could not report at 0700 hours as required because he had an Alcoholics Anonymous meeting that morning.

[13] On 17 October 2012, at 0500 hours, he failed to report for his duty shift in the Nelles Galley at CFB Esquimalt despite being aware of his duty shift as the shift schedule for all cooks had been posted in the galley in accordance with the unit's standard procedure. Ordinary Seaman O'Toole also failed to report to the Base Duty Officer as required as a condition of his release from custody. Again, his unit initiated the procedures to locate an absentee. The unit checked his single quarters room, attempted to contact Ordinary Seaman O'Toole by telephone; checked with the Base Clinic; local hospitals; Ordinary Seaman O'Toole's known health care providers; the military police; and the hotel where Ordinary Seaman O'Toole had previously been staying. None of these measures were successful in locating Ordinary Seaman O'Toole. As a result of his failure to comply with conditions of his release, and was absent without leave, his commanding officer issued a warrant for his arrest, on 17 October 2012.

[14] The next day, 18 October 2012, at 1740 hours Ordinary Seaman O'Toole surrendered himself to the military police; he was arrested at that time. The arresting military police officer determined that Ordinary Seaman O'Toole should be retained in custody and he prepared a report of his custody for his unit custody review officer. On 19 October 2012, Ordinary Seaman O'Toole was charged with a number of offences related to events from 29 September to 18 October 2012. On the same day, the custody review officer determined that he was required to be retained in custody, and she requested that arrangements be made to bring him before a military judge for a custody review hearing. A custody review hearing was held on 25 and 26 October 2012, and the presiding military judge ordered that Ordinary Seaman O'Toole was to be retained in custody. Upon motion brought to the Court Martial Appeal Court on 5 October 2012, on behalf of Ordinary Seaman O'Toole to have this order reviewed, the Chief Justice of that court dismissed the motion on 6 October 2012, for reasons to follow.

[15] The parties have also agreed on a series of facts found relevant for the determination of sentence, Exhibit 8. They indicate that Ordinary Seaman O'Toole has been in custody since 18 Oct 2012. Prior to this period of custody, he was in custody for two additional days. He has now been in custody 30 days on this matter. The offender is 25 years old, he enrolled in the Canadian Forces on 15 September 2009 and has served approximately three years, he originates from Winnipeg, where he resided with his mother. At 15 years of age, he moved to Sidney, British Columbia with his father and remained with him until after graduating from high school in 2005. After graduation, he returned to Winnipeg where he joined the Canadian Forces. His father, Gerald O'Toole still lives in greater Victoria. Ordinary Seaman O'Toole maintains a good relationship with both parents. He has one younger sister who remained with his mother when he moved to Sidney. He attended high school in Sidney and graduated grade 12 at Parklands High School in Sidney. Ordinary Seaman is trained QL4 as a cook. This qualification is transferrable to the civilian qualification system upon a passing of a test. Ordinary Seaman O'Toole, once released from the Canadian Forces, is anticipating working at a local restaurant as a cook where he knows the staff. According to his testimony, his place is secured with the owner of that restaurant. It is his intention to continue his cooking training once released.

[16] It is advanced that Ordinary Seaman O'Toole did not have any difficulty with alcohol prior to joining the Canadian Forces, but his consumption developed into a problem recently. He attended Edgewood Treatment facility and was successful for a while in remaining sober. It is his intention to continue with attempts to control his drinking. He testified that he will continue with the support groups in place further to his treatment at Edgewood Facility and with his sponsor with Alcoholics Anonymous, in addition to attending AA meetings on a regular basis.

[17] The parties informed the court that a sentence to dismissal will preclude Ordinary Seaman O'Toole to claim some release benefits, including the costs for a move back to his place of enrolment and his severance payment, which would have been in the vicinity of \$3,000. Ordinary Seaman O'Toole has applied for a voluntary release from the Canadian Forces. At the same time, his unit has initiated an administrative review with a recommendation that he be released under item 5(f) to the Table to article 15.01 of the Queen's Regulations and Orders for the Canadian Forces. A release under this item would reflect that Ordinary Seaman O'Toole was "Honourably Released." The application for administrative review was sent to the Director of Military Careers Administration on 16 October 2012. However, should the court accept the recommendation of counsel and sentence Ordinary Seaman O'Toole to dismissal as a punishment, he would be released from the Canadian Forces under item 1(a), and the notation on his service record would state "Dismissed for Misconduct."

[18] Ordinary Seaman O'Toole was found guilty before a standing court martial on 10 September 2012 of disobedience of a lawful command under section 83 of the *National Defence Act*, stealing under section 114 of the *Act*, and failure to comply with conditions imposed under Division 3 under section 101.1 of the *Act*. The court accepted a joint submission by counsel and sentenced him to a reprimand and a fine in the amount of \$1200. I presided that trial. These offences were committed in April 2012 during a period where Ordinary Seaman O'Toole battled with substance abuse. Shortly after the events that led to the charges, he was admitted at Edgewood for a 55 day in-house treatment programme for addiction problems. He had successfully completed the programme and resumed his regular activities within his unit prior to his court martial. In early September 2012, the court martial was informed that he was doing very well. Noting that Ordinary Seaman O'Toole had previous entries on his conduct sheet related to absences without leave and drunkenness for events that occurred in mid-November 2010, the court imposed a sentence that it considered minimal in the circumstances to meet the objectives of general deterrence, specific deterrence, denunciation, and rehabilitation.

[19] During his testimony before this court martial, Ordinary Seaman O'Toole readily admitted that he has relapsed, but that he has not consumed alcohol after 1 October 2012. Ordinary Seaman O'Toole has expressed his view that after his release from the Canadian Forces, which could be effective before the end of this month according to the prosecution should he be sentenced to dismissal, he would not be left by himself to deal with his alcohol addiction. He explains that there is an effective after support telephone and online programme with Edgewood that is available 24/7 as well

as support groups. In addition, he continues to participate in Alcoholics Anonymous meetings and he is in contact with a sponsor. Ordinary Seaman O'Toole has also confirmed that his family is supportive and that they will assist him in his reinsertion in the civilian community. Ordinary Seaman O'Toole has confessed that he had difficulty to deal with the stress associated with his duties as a cook in a large military environment and he feels confident that working in a different work setting, such as a small privately owned restaurant, will be significantly positive to help him to deal with his problems. Ordinary Seaman O'Toole's father has also testified. His testimony satisfied the court that Ordinary Seaman O'Toole will be able to count on a strong support group and on his family once released from the Canadian Forces.

[20] It remains that the fundamental purpose of sentencing at court martial is to contribute to the respect of the law and the maintenance of military discipline by imposing punishments that meet one or more of the following objectives:

- (a) protection of the public, including the Canadian Forces;
- (b) the denunciation of the unlawful conduct;
- (c) the deterrent effect of the punishment, not only on the offender, but also upon others who might be tempted to commit such offences; and
- (d) finally, the reformation and rehabilitation of the offender.

[21] Any sentence must take into consideration the following principles: it must be commensurate with the gravity of the offence, the previous character of the offender and his/her degree of responsibility; it should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; an offender should not be deprived of liberty if less restrictive punishments may be appropriate in the circumstances; and finally, the sentence should or will be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. As expressed many times before, the court shall always act with restraint in determining sentence by imposing such punishment or punishments that constitute the minimum necessary intervention to maintain discipline.

[22] In this case the aggravating factors are the following:

- (a) the objective seriousness of an offence under section 129 of the *National Defence Act*, which is punishable to a maximum of Dismissal with disgrace from Her Majesty's service and; therefore, a serious offence. Whereas a person found guilty of an offence under section 101.1 or section 90 of the *Act* is liable to imprisonment for less than two years;
- (b) secondly, the subjective seriousness of the offences as described in the Statement of Circumstances. As it was the case for his court martial that took place less than two months ago, Ordinary Seaman O'Toole has con-

tinued with a pattern of conduct that evacuated any respect for the basic tenets of military discipline and the rule of law. Whether his behaviour was exacerbated by his alcohol addiction and his lack of ability to deal with the inherent stressors of military life as a cook, it does not diminish his responsibility where he has chosen to conduct himself improperly and to respect his own undertaking to respect bail conditions imposed on him on several occasions; and

- (c) thirdly, Ordinary Seaman O'Toole has an extensive prior record of related military convictions ranging from convictions for absences without leave, failure to respect bail conditions, conduct to the prejudice of good order and discipline, and drunkenness. All convictions relate to offences committed from November 2010 to October 2012. It is the second court martial held in Esquimalt in the last two months to deal with offences committed by this non-commissioned member. Obviously, the recent court martial and the punishments imposed on him did not have the specific deterrent effect sought. It must be emphasized that Ordinary Seaman O'Toole enrolled in the Canadian Forces in September 2009.

[23] There are nevertheless several mitigating circumstances in this case:

- (a) Ordinary Seaman O'Toole has pleaded guilty to all charges before the court. He accepts full responsibility for his conduct. Ordinary Seaman O'Toole has expressed his regrets, the trouble he has caused to the Canadian Forces, his unit, and his peers;
- (b) he has spent one month in pretrial custody until the passing of this sentence; and
- (c) the offender is still relatively young at 25 years of age. This young adult will continue his life as a civilian in this local community. The court believes, like Ordinary Seaman O'Toole's father, that he has the potential to be a valuable asset to society. It may be the end of a very short military career, which obviously was not meant for him, but his journey is not over. Ordinary Seaman O'Toole is at crossroads. The evidence before the court is sufficiently positive to conclude that the necessary support is there to assist him in his recovery from alcohol abuse; however, he has to commit himself to become a responsible and reliable citizen. In order to do so, he will make sure to create a positive environment around him if he wants to be successful.

[24] During his submissions, counsel for the prosecution provided the court with a series of relevant and recent court martial decisions in support of the joint submission on sentence to provide the applicable range of sentences, including *R v Nicholson*, 2009 CM 1015, *R v Billingsley*, 2009 CM 2016; *R v Tupper*, 2007 CM 2016 and 2009 CMAC 5; *R v Labrie*, 2008 CM 1013; *R v Dupuis*, 2010 CM 3005; and *R v Zammitti*, 2010 CM

3024. Counsel for the defence submitted that all these cases were relevant and more aggravating than the case at bar. I disagree. Some aspects are more aggravating, others are less severe. However, I agree with counsel that they provide an adequate range of sentences. There is no doubt that any sentence imposed in this case shall promote the objectives of general deterrence, denunciation, and punishment of the impugned conduct. Considering the repetitious behaviour of Ordinary Seaman O'Toole, particularly the non-respect of his bail conditions, the sentence must equally have a specific deterrent effect now that he will soon continue his life as a civilian. The sentence must deter him to disrespect the rule of law and the justice process. The joint submission does not adequately contribute to the pursuit of this essential objective. Finally, I agree with counsel that the sentence should not hamper his rehabilitation.

[25] After balancing all these objectives and principles and applying them to the specific circumstances of these offences and on this offender, I conclude that any sentence must include some deprivation of liberty in the form of imprisonment. The punishment of dismissal alone or in conjunction with other punishments that would not include imprisonment, is not sufficient in my view to satisfy the need for general and specific deterrence as well as the punishment and the denunciation of the offender. With regard to the weight to be given to time spent in pretrial custody, it is left to the discretion of the presiding judge. There are no provisions in the *National Defence Act*, unlike the *Criminal Code*, that provide a mechanism to compute the time spent in custody prior to the trial for sentencing purposes. There is no evidence before this court that the conditions of the pretrial custody were so onerous that the dead time should be credited with more than one day for each day served in pre-sentence custody.

[26] Ordinary Seaman O'Toole has largely demonstrated that he is not suitable for further military service, but he has also eloquently established through his behaviour that he does not abide by the rule of law. In the circumstances, the minimal sentence would include imprisonment for a period of 45 days and dismissal. Considering that Ordinary Seaman O'Toole has spent 31 days in pretrial custody, the court considers that 14 days of imprisonment is warranted, including the accompanying punishment of dismissal. The prosecution expressed the view that there might not be sufficient evidence before the court to identify exceptional circumstances that would justify the suspension of the period of imprisonment. I respectfully differ. Serving such a short period of imprisonment in the Canadian Forces Detention Barracks in Edmonton, Alberta would unnecessarily deprive Ordinary Seaman O'Toole of his own support group and it is unlikely that the military authorities could provide him with an adequate replacement for this short period. It is in the best interests of justice that Ordinary Seaman O'Toole embarks with his new life with a clear understanding that ignoring the judicial processes of this country carries serious consequences, including deprivation of liberty. The court is satisfied that the personal circumstances of Ordinary Seaman O'Toole are sufficiently compelling that the court will suspend the carrying into effect of the period of imprisonment.

FOR THESE REASONS, THE COURT:

[27] **FINDS** you guilty of all charges, namely two counts under section 129 of the *National Defence Act*, for conduct and neglect to the prejudice of good order and discipline; two counts under section 90 of the *Act* for absences without leave; and two counts for failure to comply with conditions imposed under Division 3 under section 101.1 of the *Act*.

[28] **SENTENCES** you to imprisonment for a period of 14 days and to the accompanying punishment of dismissal.

[29] **SUSPENDS** the carrying into effect of the punishment of imprisonment.

Counsel:

Lieutenant-Colonel S.D. Richards, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Major D. Berntsen, Directorate of Defence Counsel Services
Counsel for Ordinary Seaman K.G. O'Toole