Citation: *R. v. Corporal S.W. Arnsten*, 2004 CM 20

Docket: S200420

STANDING COURT MARTIAL
CANADA
ALBERTA
CANADIAN FORCES BASE/AREA SUPPORT UNIT EDMONTON

Date: 26 March 2004

PRESIDING: COLONEL K.S. CARTER, M.J.

HER MAJESTY THE QUEEN
v.
CORPORAL S.W. ARNSTEN
(Accused)

SENTENCE
(Rendered Orally)

_1_ Corporal Arntsen, the court, having accepted and recorded your plea of guilty to charges number one, two, and three on the charge sheet, the court now finds you guilty of those charges.

_2_ This is an unusual case in many ways, not the least of which is the length of pre-trial custody the offender, yourself, has undergone. There is a period of pre-trial custody of 17 days. The court has taken that into account in considering an appropriate sentence. As set out in the case provided by the prosecutor, *R. v. Wust*, (2000) 143 C.C.C. (3d) 129, a decision of the Supreme Court of Canada, the actual manner of applying pre-trial detention against a sentence is one that is left to the trial judge. The Supreme Court makes it clear that some credit should be given for time spent in custody, but does not indicate, specifically, what credit.

_3_ Now, the court would point out that the circumstances of military pre-trial custody differ, to some degree, from those of civilian pre-trial custody, and in that regard the court refers to paragraph 41 of that decision where the Supreme Court quotes from a Mr Gary Trotter in his text, "The Law of Bail in Canada," where he says:

> Remand prisoners, as they are sometimes called, often spend their time awaiting trial in detention centres or local jails that are ill-suited to lengthy stays. As the Ouimet Report stressed, such institutions may restrict liberty more than many institutions which house the convicted. Due to overcrowding, inmate turnover and the problems of effectively implementing programs and [recreational] activities, serving time in such institutions can be quite onerous.

_4_ The court does not find that those same conditions exist in military pre-trial custody. In addition, while in military pre-trial custody, the offender usually receives pay and allowances, unlike civilians in jail who are no longer being paid by their employer.

_5_ Finally, in this case, we have the unusual situation where this pre-trial custody was not judicially reviewed, but rather that judicial review was still outstanding at the commencement of this court martial. What that means is the court accepts that you've been in 17 days' military pre-trial custody with no judicial review, and that that should mitigate the sentence the court imposes upon you. As both counsel have properly identified there are three military charges that you have pled guilty to, and the court agrees with both counsel that a military punishment is the most appropriate punishment here. In the absence of pre-trial custody and certain mitigating factors that have been put forward by your defence counsel, and through the witnesses he has called on your behalf, the court might well have considered a further custodial sentence necessary.

_6_ In determining an appropriate sentence the court has considered: the evidence it has received on the circumstances surrounding the commission of these offences, including the testimony of Mr Roy, your psychologist, and Dr Elwood, your psychiatrist; the evidence of your background and current circumstances; as well as the submissions of counsel which have been of great assistance; and the principles of sentencing. The court must, and does, follow certain principles in determining what is an appropriate sentence. They include: protection of the public; punishment of the offender; deterrence, both general and specific; and reformation and rehabilitation. And in the context of a court martial, the primary interest of the Canadian Forces is the maintenance or restoration of discipline which is a fundamental requirement of any military force and it is a prerequisite for operational efficiency.

_7_ Discipline has been described as a willing and prompt obedience to lawful orders, including orders to sign in and orders to attend disciplinary proceedings. Orders are the foundation of military life, and as you, and your apparently soon to be former unit are well aware, compliance with lawful orders may have a detrimental or even fatal consequence for CF members. Nevertheless, their prompt and willing compliance is of fundamental importance, not only for the success of a mission, but for the safety and well-being of other Canadian Forces members. True discipline is

founded on mutual trust and respect, not only up and down the chain of command, but also among service members. An efficient unit requires cohesion among its members, which means they must be able to trust and respect one another and rely on the fact that the other members will comply with lawful orders.

_8_ I've spoken about the principles of sentencing which this court applies. The principle of punishment is self-explanatory. It is a consequence that society imposes for a breach of its laws. It is denunciation by society of misconduct. In some cases, though that is not the case here, a minimum punishment is imposed for the commission of certain offences. General deterrence is a principle that the sentence imposed should deter others in similar situations from engaging, for whatever reasons, in the same prohibited conduct. And the principle that applies to deter the offender, personally, from re-offending is called specific deterrence. That means the sentence should deter you from re-offending, not just from committing the same offence or similar offences again, but from committing any offences again. And the court would say that it has wrestled rather long and hard with how this could be achieved in your specific situation since the evidence before it indicates that this may be very difficult.

_9_ Reform and rehabilitation, though they are the last principles that I am listing, are of importance. And once again, looking at the evidence before the court, reform and rehabilitation, in your case, seems to be something which, if it is possible, will take a very long time. The court, after considering the nature of these offences, has decided that the predominant principle to be applied, as both counsel have submitted, is deterrence. Primarily general, but to the extent possible, specific. In addition, there are other important considerations that the court must and has taken into account. QR&O 112.48 requires that any sentence take into account, not only the nature of the offence, but also the background; that is, the previous character of the convicted person. QR&O 112.48 also requires that this court consider, very carefully, the circumstances that this offence was committed in and the effect, direct and indirect, of any sentence upon you.

_10_ Now, the evidence before the court with regard to the gravity of these offences and their circumstances is set out primarily in the Statement of Circumstances. There were a series of three offences which occurred between the 24th of February and the 12th of March, this year. They all relate to non-compliance with lawful direction. In and of themselves, they demonstrate an inability to act in a disciplined fashion. The information the court has received about your personal circumstances confirms that, to some degree, those offences are somewhat predictable given your personal characteristics, your choices, and your medical condition. The court has listed all three as it is clear from the testimony of Mr Roy, and particularly Dr Elwood, that a combination of factors have led to your current situation.

_11_ The court has considered, carefully, the evidence of both your psychologist and your psychiatrist, and it will not review in detail, here, everything that they have said, but it will summarize. And in summary, they have indicated that you had a pre-existing personality disorder, that you developed a medical condition; post traumatic stress disorder, which began as a reaction to experiences that you underwent in Afghanistan, and that these have been exacerbated by certain personal addictions.

_12_ The court would refer to an extract from Exhibit 13, that has been put before it by your counsel, which, in essence, summarizes, rather effectively in the court's view, the evidence before it. And I am quoting, here, from the second page of the report, which is, for some reason, identified as page 3 at the top, but is the second page. And it's under the title "Impression/Formulation." And what that says is as follows:

> Cpl Arntsen presented with a history of serious problems of adjustment to life after his tour to Afghanistan in 2002 based on the symptoms he reported. He seemed to have been completely unprepared for the horror and enormity of the scene he witnessed after the accidental bombing of the Canadians. To Cpl Arntsen this was brutal killing and dismemberment of his best friend and a close friend. He also felt he was personally threatened with danger from Afghani rockets blowing up a fuel access point. He was also confronted with almost killing a child.
>
> He reported he went through an exercise of emotionally detaching himself from his future and accepting death and as such he has difficulty accepting his survival. He sees life as meaningless at one level, although at another level, he wants to be alive. His condition is complex and serious, involving extreme reactions, bizarre and gruesome re-experiencing scenes, visual and auditory hallucinations and trauma-related nightmares).
>
> There are hints in his responses that he may have borderline personality and narcissistic traits. If so, he would be already disposed to being needy for admiration and "special-ness" and prone to emotional instability and identity disturbance. To these are now added the traumatic experiences of his tour, which are also destabilizing. He is dealing with the trauma of the experience and very likely hurting from being "denied" special attention for his

> participation in the horrors of ... war. He lost two close friends (relationships to which he may have had an intense attachment) and he has appeared to be left stranded in between two worlds struggling to redefine who he ... is.
>
> He reportedly engaged in inappropriate behaviours suggestive of a complicated maladjustment to his traumatic experiences....

_13_ The evidence before the court is that you were offered treatment for your personality traits or disorder; that is, cognitive therapy, treatment for your post traumatic stress disorder, counselling and coping mechanisms, and also treatment for your addiction. You only partially accepted this assistance. You missed appointments and you suffered relapses. The court, however, will credit you with some attempts to deal with your problems. The court has taken into account, as particularly important, the information before it that certain factors may have contributed as causation to these offences before it; that is, your insomnia, your poor short term memory, and to a certain degree your lack of ability to concentrate. Nevertheless, as your own counsel has said, these are not excuses, but may in part be explanations for what you have done.

_14_ The evidence before the court shows you have very serious problems and that you are no longer suitable to be a member of 3 PPCLI or the infantry or, in fact, the Canadian Forces generally. The court would also say there is nothing in the evidence before it that shows any responsibility on the part of your unit or unit personnel for the difficulties you have suffered. The prosecution has submitted that these offences should be considered as serious challenges to discipline; that the court should take into account you suffer personality and medical challenges; that the court should also take into account your pre-trial custody; but that general deterrence requires visible consequences and therefore suggests that an appropriate sentence would be a period of 30 days' suspended imprisonment that would be held over your head for a year. It is the submission of the prosecution that this would best meet the requirements of specific and general deterrence.

_15_ Your defence counsel has been most eloquent in his assessment of the difficulty of determining an appropriate sentence in this particular case. He has stressed, in mitigation, your guilty plea, which is an acceptance of responsibility on your part, and also your medical condition. He has asked the court to impose a sentence that would not set you up for failure; that is, that the court punish you in a way that will allow you transition, as quickly as possible, to civilian life and the ability to undergo treatment. Major Turner suggested that a reprimand and, in essence, an acknowledgement of time served would be sufficient to meet both specific and general

deterrence and he stressed that this was not a situation where you were using your medical condition to escape justice.

_16_ As the court has indicated, it is really difficult, in this case, to determine how effective specific deterrence will be. It is hard to gauge, and ultimately, the court will say, it hopes that the period of incarceration you have already undergone will contribute significantly to your specific deterrence. With regard to general deterrence, the court feels that it is required to have a visible military consequence, a visible military punishment imposed here. The court does not know, although it was suggested by your counsel, what the impact of seeing you in pre-trial detention was on the privates and corporals who, apparently, had to spend time guarding you from your unit. The court, however, feels that a reprimand is not sufficient. At the same time, it does not feel that the imposition of a further period of imprisonment is required, nor desirable, even if it is suspended.

_17_ As the court has indicated, it has taken your incarceration into account. What the court has considered is how it could put you in a position which, in essence, you would have been in if you had undergone that incarceration as a post-trial incarceration, and also how it could demonstrate a visible consequence. So the court is going to impose a sentence on you which, in essence, will result in something very similar to a period of incarceration, post-trial, where you would not have been paid. This is a sentence which will result in a $500 a month pay reduction, immediately, and if you're released a $2,500 reduction in your severance pay. It is one that the court believes will reflect that the actions that you did were not consistent with being a corporal, which is a rank which reflects a certain responsibility and good conduct.

_18_ Corporal Arntsen, the court sentences you to reduction in rank to the rank of private. Mr Officer of the Court, march out Private Arntsen. The proceedings of this court martial, in respect of Private Arntsen, are now terminated.

COLONEL K.S. CARTER, M.J.

Counsel:

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