



COURT MARTIAL

Citation: *R. v. Burton*, 2014 CM 2024

Date: 20141208

Docket: 201416

General Court Martial

5th Canadian Division Support Base
Oromocto, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

Master Bombardier B.A. Burton, Offender

Before: Colonel M.R. Gibson, M.J.

REASONS FOR SENTENCE

[1] Master Bombardier Burton, having accepted and recorded your plea of guilty to the first charge on the charge sheet, the court now finds you guilty of this charge and directs that the proceedings on the second charge be stayed.

[2] You have pleaded guilty to the offence of striking a superior officer, contrary to section 84 of the *National Defence Act*. It is now my duty to determine an appropriate, fair and just sentence.

[3] In doing so, the court has considered the principles of sentencing that apply in the military justice system, the facts of the case as disclosed in the documents introduced in evidence and the testimony of witnesses, as well as the submissions of counsel for the prosecution and the defence.

[4] The fundamental purposes of sentencing by service tribunals in the military justice system, of which courts martial are one type, are: to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, effi-

ciency and morale; and to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[5] The fundamental purposes are achieved by the imposition of just sanctions that have one or more of the following objectives: to promote a habit of obedience to lawful commands and orders; to maintain public trust in the Canadian Forces as a disciplined armed force; to denounce unlawful conduct; to deter offenders and other persons from committing offences; to assist in rehabilitating offenders; to assist in reintegrating offenders into military service; to separate offenders, if necessary, from other officers or non-commissioned members or from society generally; to provide reparations for harm done to victims or to the community; and to promote a sense of responsibility in offenders and an acknowledgement of the harm done to victims and to the community.

[6] The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[7] Other sentencing principles include: a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances; a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; an offender should not be deprived of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances; a sentence should be the least severe sentence required to maintain discipline, efficiency and morale; and any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

[8] In the case before the court today, I must determine if the sentencing purposes and objectives would best be served by deterrence, denunciation, rehabilitation, or a combination of these factors.

[9] The court must impose a sentence that is of the minimum severity necessary to maintain discipline, efficiency and morale. Discipline is that quality that every Canadian Forces member must have that allows him or her to put the interests of Canada and of the Canadian Forces before personal interests. This is necessary because members of the Canadian Forces must promptly and willingly obey lawful orders that may potentially have very significant personal consequences, up to injury or even death. Discipline is described as a quality because ultimately, although it is something which is developed and encouraged by the Canadian Forces through instruction, training and practice, it is something that must be internalized, as it is one of the fundamental prerequisites to operational effectiveness in any armed force. One of the most important components of discipline, in the military context, is self-discipline. This includes the self-discipline required to restrain one's frustrations when things don't go the way we might like, and to refrain from expressing those frustrations in acts of physical violence or insubordination. Master Bombardier Burton, your actions demonstrate that this is an area in which you have been deficient.

[10] The facts of this case are disclosed in the statement of circumstances entered into evidence. On the morning of 30 September 2013, Captain Duvall, who was the Troop Commander for the Radar Troop of 119 Battery, and Master Bombardier Burton's troop commander, met with Master Bombardier Burton to discuss a Progress Development Review Part I. At that point, Master Bombardier Burton was quite calm and receptive. Later that same day, after lunch, Captain Duvall saw Master Bombardier Burton again in the hallway. Master Bombardier Burton asked Captain Duvall if they could speak about something. They then went into the 119 Battery Sergeant's office and closed the door. At that point Master Bombardier Burton showed an email that Captain Duvall had sent him earlier that day. The email read:

"MBdr, Great. I'll get started on this right away for you.

With regard to timings and informing your chain of command – I understand you have your own medical issues going on, and I respect your privacy on such matters, just remember that you are still in the Army and you still have certain obligations. Just keep that in mind.

Simon Peter Duvall
Captain"

[11] Upon showing that email, Master Bombardier Burton stated, "You don't need to remind me that I'm in the army." He then grabbed his uniform, at his rank slip on, and shook it. He then said "You're really pissing me off." At this point Master Bombardier Burton quickly advanced towards Captain Duvall and started punching him with his right hand. Captain Duvall was in the corner by the hinge side of the door between Master Bombardier Burton and the wall. Captain Duvall put up his left hand to try to absorb or block some of the blows.

[12] Master Bombardier Burton struck Captain Duvall between eight and ten times. Blows hit his head, face, jaw, neck, left shoulder, left forearm and left hand. Captain Duvall did not strike back. When he was done, Master Bombardier continued yelling that he was a sick man.

[13] Captain Duvall presented himself to sick parade on 1 October 2013. The medical examination of Captain Duvall indicated the following:

- a. pain on palpitation along the lower aspect of the skull and down into the neck and shoulder;
- b. pain on palpitation along the spine to mid back;
- c. slight bruising to the left shoulder, and pain on palpitation;
- d. pain with head movement left and right; and,

- e. pain in shoulder and neck within the range of motion.

[14] The medical assessment suggested that Captain Duvall may have sustained a mild brain concussion.

[15] The court considers that the aggravating factors in this case are the following:

- a. The objective gravity of the offence of which Master Bombardier Burton has been convicted. The offence of striking a superior officer under section 84 of the *National Defence Act* is punishable by imprisonment for life, and is thus amongst the most objectively serious offences created by Parliament in the *National Defence Act*.
- b. The unprovoked nature of the attack.
- c. The physical injuries to the victim, Captain Duvall.
- d. The psychological and emotional impact on the victim, Captain Duvall.
- e. The negative impact on the good order and discipline of the unit arising from the incident testified to by Captain Duvall and the Battery Commander, Major Brassard.

[16] The mitigating factors in this case include the following:

- a. First and foremost, that Master Bombardier Burton has pleaded guilty to the offence. This is always an important mitigating factor, reflecting that the offender has accepted responsibility for his actions. Moreover, Master Bombardier Burton made an expression of remorse for his actions during his testimony on sentencing.
- b. The absence of a conduct sheet or any other indication of prior convictions.
- c. The successful completion by Master Bombardier Burton of the administrative measure of Counselling and Probation that was imposed by his unit arising from this incident.
- d. The significant period of time, some 15 months, that has elapsed since the commission of the offence.
- e. The fact that in April 2013, Master Bombardier Burton was diagnosed with mild Post-Traumatic Stress Disorder (PTSD), in relation to his deployment in Afghanistan between November 2009 and August 2010. I shall discuss the import of this consideration in more detail shortly.

[17] The principles of sentencing that the court considers should be emphasized in the present case are denunciation, and general and specific deterrence. Confidence in the honesty, integrity, discipline, maturity and good judgment of members of the Canadian Forces, both by the general public, and other Canadian Forces members, is critical to the effectiveness of the Canadian Forces in the fulfilment of their important functions. Members of the Canadian Forces are rightly held to a very high standard. The actions of Master Bombardier Burton constitute a significant derogation from those standards. He must never repeat these actions, and other members of the Canadian Forces must also understand that such actions are simply not tolerable, and must be deterred from committing them.

[18] The prosecution has made a submission suggesting a sentence including the punishments of detention for 21 to 30 days, and reduction in rank to private. As master corporal is an appointment and not a rank, as the prosecution has correctly noted and as specified in Note (D) to *QR&O* 108.24, if reduction in rank were to be imposed as a punishment in this case, it would involve a reduction to the rank of private.

[19] The defence argues that a custodial sentence is not warranted in this case, and suggests a fine in the area of \$2000, plus a severe reprimand. It further suggests that if the court considers a custodial sentence to be warranted, it should be a short period of around seven days, and that it should be suspended.

[20] I have carefully considered the cases that both the prosecution and defence provided the court as sentencing precedents. They disclose a wide range of potential sentences for this offence. I am satisfied, however, that the minimum sentence required for the protection of the public and to maintain discipline, efficiency and morale on these facts involves a custodial sentence.

[21] As the Military Judge in the Standing Court Martial of *Corporal P.S. Blouin*, 2004CM25, stated at paragraphs 12-15 of the court's reasons for sentence:

[12] The Court considers the following factors to be aggravating factors:

first, the nature of the offence and the sentence provided by Parliament. Striking a superior officer or violence to a superior officer is punishable by imprisonment for life. This is not only an extremely serious offence, it is an offence intended to protect the very foundations, and the essential requirements, of a professional and disciplined army in a free and democratic society, including obedience to and respect for the chain of command....

At paragraph 13, the judge continued:

[13] As the former Chief Justice of the Supreme Court of Canada wrote in *Généreux*, as cited by the prosecution:

To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be

dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct.

At paragraph 14, the military judge continued :

[14] This is the reason why there is an offence such as the one set out in section 84 of the *National Defence Act*. In fact, someone who commits an assault under section 266 of the *Criminal Code* is liable to a maximum term of imprisonment of five years if he or she is prosecuted by indictment. It must be made clear that a soldier who assaults a superior officer is attacking not merely the individual, but the cornerstone of the military institution he or she represents: the chain of command. It is in part for this reason that the offence of violence to a superior officer is as objectively serious as the offence of treason or mutiny, for example.

[22] Finally, at paragraph 15, the military judge continued:

[15] Accordingly, the nature of the offence or offences, the context and the circumstances surrounding the commission of the offence are the main factors why this Court has found that protection of the public and maintenance of discipline will be better served by a sentence that reflects collective or general deterrence and denunciation.

[23] As the Court Martial Appeal Court has pointed out, in the *St. Jean* case and others, the *dicta* of Chief Justice Lamer in *Généreux* should not be applied in a rote fashion to suggest a more severe sentence in every case. However, this type of offence, which goes to the very heart of military discipline, is one such case where the interests of discipline may require a more severe sentence than a civilian offender might be given for similar conduct.

[24] I have given very careful consideration to the import of the issue of PTSD as a mitigating factor in this case. The evidence in this regard in this case comes only from the brief statement of facts at Exhibit 10, and the testimony of Master Bombardier Burton himself when he gave evidence on sentencing.

[25] The issue of PTSD is an extremely important one, and its prevalence amongst the members of the Canadian Forces who were deployed in Afghanistan is an issue of pressing concern for the Canadian Forces and Canadian society generally. In assessing its implications as a mitigating factor on sentencing, it is necessary for the court to be both sensitive to its implications, and scrupulous to apply them to the sentencing exercise on a principled basis.

[26] A diagnosis of PTSD will almost certainly be a relevant factor on sentencing in every case in which it is present; however, short of a situation in which it renders the accused person not responsible on account of mental disorder, which will be very rare, it does not generally absolve accused persons of responsibility for their actions.

[27] A salient question in assessing the extent of its weight in mitigation will then become, on the facts of each case, can one say that "but for" the presence of the condi-

tion, the accused person would not have committed the acts in question? The evidence in the present case does not go that far. The wording of Exhibit 10 is very careful in this regard, in conveying the opinion of the treating psychiatrist. It gives a general description of the condition of PTSD, and indicates that in the psychiatric assessment on 24 April 2013 Master Bombardier Burton's reported history of illness included a variety of specified symptoms. However, this is no medical psychiatric opinion evidence before the court to the effect that these played a direct role in Master Bombardier Burton's actions on 30 September 2013.

[28] While one must of course have compassion for Master Bombardier Burton's diagnosed condition of PTSD which arose from his service to Canada in Afghanistan, I would like to emphasize two points in relation to the issue of PTSD. There is no evidence before the court that medical or therapeutic care provided at the Canadian Forces Prison and Detention Barracks would in any way be inadequate to effectively monitor or deal with issues related to medication or treatment for Master Bombardier Burton. Second, the evidence presented in this case, including the testimony of Master Bombardier Burton himself, does not indicate that Master Bombardier Burton's diagnosis of PTSD played a direct role in his commission of the offence to which he has pleaded guilty, nor that it should preclude consideration of a custodial sentence. Rather, he acted out of frustration at not getting the leave that he wanted or that he thought had been suggested by some civilian persons.

[29] Thus, while the court considers that it is, of course, appropriate to take it into account as a mitigating factor, amongst other factors, on the facts of this case it is not a dispositive factor in the sense of precluding what would otherwise be appropriate sentencing disposition.

[30] However, given the significant weight to be given to the mitigating factors of your guilty plea, your successful completion of counselling and probation, your diagnosis of PTSD, the period of time that has elapsed since the commission of the offence, and the other challenges in your life, the court has given favourable consideration to the suspension of the sentence.

FOR THESE REASONS, THE COURT:

[31] **FINDS** you guilty of the first charge on the charge sheet, and directs that the proceedings on the second charge be stayed.

[32] **SENTENCES** you to detention for 30 days. This sentence was imposed at 1758 hours, 8 December 2014.

[33] **SUSPENDS** the carrying into effect the punishment of detention, pursuant to section 215 of the *National Defence Act*.

Counsel:

Major D. Martin, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Lieutenant-Commander P. Desbiens, Directorate of Defence Counsel Services
Counsel for Master Bombardier Burton