COURT MARTIAL

Citation: *R. v. Caicedo*, 2015 CM 4020

Date: 20151126
Docket: 201514

Standing Court Martial

Canadian Forces Base Borden
Borden, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Second Lieutenant C.W. Caicedo, Offender

Before: Commander J.B.M. Pelletier, M.J.

REASONS FOR SENTENCE

(Orally)

INTRODUCTION

The charges

[1] Second Lieutenant Caicedo has pleaded guilty to two charges of absence without leave (AWOL) under section 90 of the *National Defence Act* (*NDA*) and six charges of failing to comply with a condition of an undertaking imposed by a military judge under section 101.1 of the *NDA.* After having pleaded not guilty to four more charges under section 101.1 of the *NDA* relating to conditions imposed by custody review officers, he admitted the facts constituting the essential elements of these four offences and was, consequently, found guilty. These charges had been the subject of an application contesting the constitutionality of the section under which the conditions were imposed at the outset of the proceedings.

Matters considered

[2] It is now my duty as the military judge presiding at this Standing Court Martial to determine the sentence. In so doing, I have considered the principles of sentencing that apply in the ordinary courts of criminal jurisdiction in Canada and at courts martial. I have also considered the facts relevant to this case, especially those disclosed in the joint statement of facts introduced as Exhibit 3, part of which was read by the prosecutor as the statement of circumstances relating to the guilty plea. I have considered the voluminous material submitted during the course of the sentencing hearing, the testimony of witnesses, as well as the submissions of counsel.

Purpose of the military justice system

[3] The military justice system constitutes the ultimate mean to enforce discipline in the Canadian Armed Forces, and a fundamental element of the military activity. The purpose of this system is the promotion of good conduct by allowing the proper sanction of misconduct. It is through discipline that an armed force ensures that its members will accomplish successful missions in a trusting and reliable manner. In doing so, it also ensures that the public interest, in promoting respect for the laws of Canada, is served by punishment of persons subject to the Code of Service Discipline.

OBJECTIVES AND PRINCIPLES OF SENTENCING

[4] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of discipline by imposing sanctions that have one or more of the following objectives:

(a) to protect the public, which includes the Canadian Armed Forces;

(b) to denounce unlawful conduct;

(c) to deter the offender and other persons from committing the same offences;

(d) to separate offenders from society where necessary; and

(e) to rehabilitate and reform offenders.

[5] When imposing sentences, a sentencing judge must also take into consideration the following principles:

(a) a sentence must be proportionate to the gravity of the offence;

(b) a sentence must be proportionate to the responsibility and previous character of the offender;

(c) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(d) an offender should not be deprived of liberty, if applicable in the circumstances, if less restrictive sanctions may be appropriate; and

(e) all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[6] That being said, the punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances. For a court martial, this means imposing a sentence composed of the minimum punishment or combination of punishments necessary to maintain discipline.

[7] The *Queen's Regulations and Orders for the Canadian Forces* (QR&O) requires that the judge imposing a sentence at a court martial consider any indirect consequence of the finding or the sentence, and impose a sentence commensurate to the gravity of the offence and the previous character of the offender. Any sentence imposed must be adapted to the individual offender and the offence he or she committed. As well, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This is not a result of slavish adherence to precedent, but because it appeals to our common sense of justice that like cases should be treated in similar ways.

THE OFFENCES AND THE OFFENDER

The offences

[8] The circumstances of the offences are as follows:

a. On 9 October 2014, Second Lieutenant Caicedo was arrested at 2052 hours by the military police for driving a vehicle with a suspended licence, disobeying a lawful command and assaulting a peace officer for which he was placed in custody. The next day he was released from custody by a custody review officer under conditions, including to report to military authorities on Canadian Forces Base (CFB) Borden once a day at 1530 hours.

b. On 23 and 25 October 2014, Second Lieutenant Caicedo did not report as required. The conviction on charges one and two rests on these facts.

c. On 4 November 2014, Second Lieutenant Caicedo did not report for duty. His whereabouts were unknown until the evening of 9 November 2014 and he failed to report as required by his conditions of release between those days. The conviction for AWOL on charge three and for failing to comply with a condition on charge four rests on these facts.

d. Second Lieutenant Caicedo was placed in custody upon returning to his unit on 9 November 2014, and was released the next day by a custody review officer under conditions, including, once again, a reporting requirement.

e. On 11 November 2014, Second Lieutenant Caicedo failed to report to Remembrance Day parade in Borden as directed and remained absent until 19 November 2014, when he appeared at his unit. He failed to report as required by his conditions of release between 11 and 18 November. The conviction for AWOL on charge five and for failing to comply with a condition on charge six rests on these facts.

f. Second Lieutenant Caicedo was placed in custody upon returning to his unit on 19 November. The next day, he was not released by the custody review officer; he was taken before a military judge on 21 November and released under conditions, including a requirement to stay on base and report. The same evening, he was arrested again for failing to comply with a condition. He was charged in relation to this, but I found him not guilty as the prosecution had failed to make a prima facie case on one of the essential elements of the offence.

g. Second Lieutenant Caicedo was released from custody by a military judge on 26 November 2014, again with conditions imposing a reporting requirement and a requirement to stay on base.

h. On 6 December 2014, Second Lieutenant Caicedo did not remain within the confines of CFB Borden and did not report to the duty officer at 1530 hours as required by his undertaking. These facts sustain the convictions on the eighth and ninth charges.

i. On 7 December 2014, Second Lieutenant Caicedo had not been granted weekend leave and did not report to the duty officer at 0900 hours as required by his undertaking. At 1000 hours, Second Lieutenant Caicedo reported to the duty officer and informed him that he was returning from Toronto, in violation of his undertaking. These facts sustain the convictions on the tenth and eleventh charges.

j. On 10 December 2014, Second Lieutenant Caicedo did not report to his chain of command at 1000 hours as required, in violation of his undertaking. He reported at 1157 hours the same day. These facts sustain the convictions on the twelfth and thirteenth charges.

k. On 17 April 2015, Second Lieutenant Caicedo’s undertaking was varied on consent of the Director of Military Prosecutions. It no longer included a reporting requirement or a requirement to stay on base.

[9] These offences and the resulting administrative tasks relating to detention and review of custody, either by custody review officers or as a result of hearings before military judges, required significant efforts and manpower on the part of Second Lieutenant Caicedo's unit. For instance, the unit was required to provide manning to the guardhouse where Second Lieutenant Caicedo was held over 191 hours over 12 different days. Also, a number of unit disciplinary investigations had to be completed and conducted to allow charges to be laid. The regimental company commander testified that having a repeat offender displaying a poor attitude within the unit was detrimental to morale. Specifically, steps had to be taken to inform more junior members of the company that they were to validate any order given by Second Lieutenant Caicedo. This is extraordinary in relation to an officer and may cause decreased confidence from the troops towards the officer corps at their unit.

The offender

[10] Before the court is a 26-year-old Army electrical and mechanical engineering officer, posted to the Royal Canadian Electrical and Mechanical Engineers School in Borden. He joined the Canadian Armed Forces as an officer cadet in 2008 and attended the Royal Military College of Canada (RMCC) in Kingston from 2008 until graduation with a Bachelor of Science degree in the spring of 2013. Second Lieutenant Caicedo's academic and military career progression has been difficult. Initially a pilot, he had to select another military occupation in 2012 after failing to succeed at primary flight training. At RMCC, he was unsuccessful in his studies to obtain an aerospace engineering degree and had to attempt to obtain a space science degree instead. That was also unsuccessful so he graduated after a fifth year of study with a Bachelor of Science. As an electrical and mechanical engineering officer, he joined his current unit in June 2013. After some initial on-the-job training, he was sent to the Basic Military Officer Qualification Land course, which he failed twice. As a result of an assessment from the training authority of unsuitability for service as an officer in the Army, his unit initiated a review of his service in the fall of 2014. At that time, Second Lieutenant Caicedo was committing service offences and displaying a negative attitude. On 23 October 2014, his unit recommended his release under item 2(a) for unsatisfactory service or conduct. A decision from the release authority has not yet been made at the time of trial.

[11] The offender's treating psychiatrist has testified as an expert and produced a report outlining her interaction with Second Lieutenant Caicedo starting on 2 October 2014. At that time, he was already on a path of misbehaviour and offences under the Code of Service Discipline, notably for absence without leave and drunkenness, as indicated in his conduct sheet. He had been assessed at a civilian psychiatric hospital on 22 September. The clinical impression of Dr Labonté was that he was suffering from hypomania. She prescribed medication on 2 October, but the offender was not compliant to treatment, failing to pick up his daily dose at the pharmacy. On 10 October 2014, she was asked to reassess Second Lieutenant Caicedo on an emergency basis, at a time when the offender was detained. He was in an acute hypomania phase of what was confirmed to be a diagnostic of bipolar affective disorder when Second Lieutenant

Caicedo was discharged from the civilian psychiatric hospital on 17 October 2014. He was prescribed, at that time, antipsychotic medication on which he remains to this day. Dr Labonté wrote in her report that recovery from an acute episode will be achieved within 6 weeks for 75 per cent of people. The offences subject to this trial here were committed over a 49-day period between 23 October and 10 December 2014. As to the link between the offences and the offender's mental condition, Dr Labonté wrote in her report as follows:

> "There is a strong association between his psychiatric illness and the behaviours which lead him to commit the offences for which he was charged. His impulsivity, grandiosity and poor judgement lead to him distorting the recommendations and/or orders to fit what he wanted to hear or do; for instance, when he was told not to drive and that he would be reported to the Ministry of Transportation, he heard that he should not be driving when tired and then told us he drove since he felt rested. He was unable to take responsibility for his actions during that period. He felt it was not him misbehaving, but people trying to put obstacles in his path. He believed they will be proven wrong. He felt that even if he was charged, the charges will be seen as having no merit and he will be exonerated. He felt he knew the rules better than his chain of command, illustrating his grandiosity."

[12] Accepting this opinion, I conclude that the judgement of Second Lieutenant Caicedo was significantly impaired by his mental condition at the time he committed the offences for which he is being sentenced. Yet, it does not absolve Second Lieutenant Caicedo of responsibility for his actions. In fact, he has accepted responsibility by pleading guilty to most offences and accepting the facts on others, as well as by testifying to the effect that he regrets the harm he has caused.

[13] Since the commission of the last offence on 10 December 2014, Second Lieutenant Caicedo has not reoffended, despite being the object of strict conditions until April 2015. The last few months, his duties have been limited to reporting at the unit in the morning in order to be assigned duties on an *ad hoc* basis. On most occasions, Second Lieutenant Caicedo spends no more than 5 to 20 minutes at work before returning to his residence in barracks on base. He is taking university courses mostly online, including a specific course which should allow him to complete the prerequisites for obtaining the space science degree from RMC which he was seeking to obtain in 2013. Second Lieutenant Caicedo has no life partner at this time. He is in a dire financial situation facing consumer debts of approximately $91,000, resulting mainly from excessive spending on leisure travel and other purchases.

[14] Second Lieutenant Caicedo is expecting to be compulsorily released from the Canadian Armed Forces and has accepted that his medical information be considered in the administrative process leading to that release. As a matter of fact, during the sentencing hearing, the court was informed by Dr Labonté that Second Lieutenant Caicedo had been assigned a permanent medical category which places him in breach of

universality of service. Indeed, even if Second Lieutenant Caicedo is currently asymptomatic, the condition of bipolar affective disorder he is suffering from is chronic and those suffering from it may have relapses. An eventual release is, therefore, likely on the medical front, in addition to a release on the conduct and performance front.

POSITION OF PARTIES ON THE SENTENCE

Prosecution

[15] In terms of the determination of an appropriate sentence, the prosecution stressed the objectives of denunciation and deterrence, asking this court to impose a sentence combining the punishments of imprisonment for 45 days and dismissal from Her Majesty's service. To support this submission, the prosecution brought the court's attention to a number of cases, from courts martial and civilian courts, showing that custodial sentences of short duration are within the range of potentially appropriate sentences for offences involving failure to comply with conditions of release committed in circumstances similar to those seen in this case. The prosecution submitted that imprisonment should be served in the Canadian Forces Service Prison and Detention Barracks in Edmonton, Alberta.

Defence

[16] In response to submissions by the prosecution, defence counsel submitted that the main sentencing objective to be met in this case is rehabilitation. The defence counsel expressed the view that the offences were the result of impaired judgement caused by a recognized mental condition over a relatively short period of time. Since then, the offender has stabilized his medical condition and as a result has ceased to offend. Second Lieutenant Caicedo is preparing for life on the civilian street, a challenge in itself which should not be rendered more difficult by a harsh sentence. Defence counsel submitted that an appropriate sentence should be a severe reprimand or, at most, dismissal alone. Should the court find that imprisonment be the minimum punishment necessary to maintain discipline, defence counsel asks that the length of the punishment be the same as time already served or that the execution of the punishment be suspended so that Second Lieutenant Caicedo does not have to actually serve any time in prison. In response to the prosecution's submission on place of imprisonment, the defence submitted that the offender should be sent to a civilian institution.

ANALYSIS

Objective gravity of the offences

[17] In arriving at evaluating what would be a fair and appropriate sentence, the court has considered the objective seriousness of the two offences of absence without leave and the ten offences of failing to comply with a condition, as illustrated by the maximum punishment that a court could impose. Offences under both section 90 and section 101.1 of the *NDA* are punishable by imprisonment for less than two years or to

less punishment. Only one punishment can be imposed by a court martial for all offences.

Subjective gravity of the offences

[18] In terms of the subjective gravity of the offences, the court accepts the representations of the prosecutor to the effect that failing to comply with conditions of release is a serious offence which includes elements of disrespect for lawful authority, here the authority of two custody review officers and one military judge. Although the circumstances of this case are less severe than those in *R. v. Grenier*, 2013 CM 4014, the words of Judge Perron on the subjective gravity of the offence are in my view applicable here. A member of the Canadian Armed Forces, especially an officer, who breaches conditions imposed on multiple occasions in exchange for the opportunity to avoid continued custody commits an abuse of the trust conferred on him or her and shows a lack of respect for the rule of law. This calls for denunciation since it is the respect for the rule of law that is one of the fundamental cornerstones of our society and of military discipline.

[19] I agree with Justice Lamont, Military Judge, who stated as follows in *R. v. Desgroseilliers*, 2013 CM 2014:

> As I stated in the case of *Private Castle* in March of 2008, in a military context I consider that the offence of failing to comply with the conditions of release from custody is somewhat more serious than the analogous offence under the *Criminal Code* for failing to comply with the conditions imposed for release from custody on charges laid under the *Criminal Code*. And the reason, of course, is that the failure to comply with conditions in the military context means the failure to comply with conditions imposed by a military judge. Members of the Canadian Forces are trained from their earliest days in the importance of compliance with the orders of their military superiors.

Aggravating factors

[20] I find that the circumstances of the offences of failing to comply with conditions are aggravating in that I am not faced with mere technical violations of reporting requirements. The offender was not late reporting; on most occasions, he left the base for several days. Also, this is not a repeated violation of one order or undertaking, but involves three distinct sets of conditions imposed on three occasions, twice by a custody review officer and once by a military judge.

[21] In terms of the two absence without leave offences, the duration of these absences was 15 days, which is significant and aggravating.

[22] Also aggravating are the impacts that Second Lieutenant Caicedo's conduct had on his unit, both in terms of the administrative burden that he generated on his colleagues and superior officers, but also in regard to the lack of respect and confidence that his conduct generated. He did, however, express regrets for that in his testimony.

[23] Finally, Second Lieutenant Caicedo committed six of the offences to which he pleaded guilty after having been convicted of drunkenness at a summary trial by a superior commander on 1 December 2014. He has clearly failed to take advantage of his conviction to reflect on his behaviour and improve.

Mitigating factors

[24] The court has also considered the following mitigating factors, as mentioned in submissions by counsel and demonstrated by the evidence presented in mitigation, especially by defence counsel:

(a) the mental condition of Second Lieutenant Caicedo at the time the offences were committed as described previously;

(b) Second Lieutenant Caicedo's guilty plea on eight charges and admission of facts in relation to four other charges which the court considers, in combination with his testimony, as a genuine sign of remorse and an indication that he is taking full responsibility for what he has done. This admission of responsibility occurred in a very formal and public forum of this court martial, in the presence of members of his current unit and chain of command;

(c) the fact that Second Lieutenant Caicedo spent 191 hours in custody over a 12-day period;

(d) the fact that Second Lieutenant Caicedo has shown marked improvement in his conduct since December 2014 and appears to have gained control over his mental illness by regularly attending medical appointments and complying with direction concerning medication. Yet, Second Lieutenant Caicedo's mental state remains fragile and this condition demands the mitigation of any sentence which may have a negative impact on his health and threaten the improvements he experienced in the last 11 months; and

(e) the age and potential of Second Lieutenant Caicedo, who appears motivated to enhance his education, deal with his debts and prepare his transition to civilian life in consideration of the fact that he should be released from the Canadian Armed Forces. Also, he can still make a very positive contribution to Canadian society in the future.

Objectives of sentencing to be emphasized in this case

[25] I came to the conclusion that in the particular circumstances of this case, the focus in sentencing should be placed on the objectives of denunciation and deterrence. Indeed, the nature of the offences require signalling that failure to comply with

conditions of release cannot be seen as tolerable in Canadian society, especially in the military environment which places particular importance on obedience to orders.

[26] That being said, I disagree with the prosecution to the effect that rehabilitation, although present, should be in the background, not at the forefront in this case. The evidence is clear to the effect that Second Lieutenant Caicedo committed the offences during a relatively short period of time while in the acute phase of a diagnosed mental condition. He did not reoffend since. The evidence is overwhelming to the effect that he will have to transition to civilian life in the near future. Consequently, I find that the objective of rehabilitation is present at the forefront in this case, along with general deterrence, the need for specific deterrence being reduced in the circumstances. In short, any sentence I impose should not have extensive detrimental effects on the efforts the offender will have to make to reintegrate as a productive member of society.

The sentences proposed are within the appropriate range

[27] As far as the case law submitted by counsel is concerned, the court gained the assurance that the proposition of counsel is within the range of potential sentences. Although I may depart from the range, that won't be necessary here.

Determination of the appropriate sentence

[28] It is an important principle that the court should impose the least severe punishment that will maintain discipline. The most severe punishment being proposed to the court, based on the scale found at section 139 of the *NDA*, is the punishment of imprisonment, which the prosecution submits should be for a period of 45 days. I do not see the need to go above that. Having identified the maximum punishment I am prepared to impose, I should start my analysis by the less severe punishment being proposed by defence and ask myself if it would be sufficient to meet the objectives of sentencing I identified above, namely denunciation, deterrence and rehabilitation. I will then proceed up the scale of punishment of section 139, as required.

[29] Is the punishment of a severe reprimand proposed as a starting point by the defence sufficient to meet these objectives? I don't believe so. Such a punishment would be clearly insufficient to adequately denounce the behaviour of the offender who repeatedly disobeyed direction from two custody review officers and one military judge. In addition, given the personal situation of the offender, who is under minimal military obligations and awaiting a release from the Canadian Armed Forces, it would be seen by those informed about the circumstances of this case, mainly in the offender's unit, as a punishment without any real consequences. That would be so, even for those privy to the mental condition of the offender. Such a punishment would have no deterrent effect whatsoever. In fact, to limit the punishment to a severe reprimand in relation to the twelve charges could well bring disrepute in the administration of military justice.

[30] Turning now to the list of punishments at section 139 of the *NDA*, I note that the next three punishments of the scale, forfeiture of seniority, reduction in rank and

detention, are not applicable to the offender given his rank and status as an officer. The next applicable punishment is dismissal. It is a punishment that is particularly adequate for behaviour that is entirely incompatible to military life. That is the case here. It is a significant punishment, more severe than detention, a punishment privative of liberty. It is also a punishment that in my view includes a symbolic signification as it recognizes formally that a person does not belong in the military community anymore and should be separated from that community forthwith. In that sense, it is a type of punishment that will meet objectives such as denunciation and deterrence, especially general deterrence. It also has an effect on the offender, but not one that would preclude rehabilitation, an important objective in this case. Indeed, the offender is already preparing for life on civilian streets. With the imposition of a sentence of dismissal, he will get there quicker. I have decided that this is an appropriate punishment to be imposed in this case.

[31] In the prosecution's submission, imposing a punishment of dismissal alone would not be sufficient to meet the objectives of denunciation and deterrence. The prosecution is seeking a punishment of imprisonment for 45 days in combination with dismissal as the minimum sentence required to maintain discipline. The defence submits that imprisonment is not required and would be detrimental to the rehabilitation of the offender. Both parties have submitted valid points and arguments in support of their position. Precedents from courts martial have included sentences of dismissal alone and sentences of dismissal combined with other punishments, such as imprisonment. It falls on me to bring my judgement to bear and decide the minimum sentence that will meet the requirement of discipline based on the evidence I have heard and the applicable principles.

[32] I find that the circumstances of the offences of failure to comply with a condition in this case and their repetitive nature, totalling 10 offences, militate for the imposition of a sentence that includes the punishment of imprisonment. The violations were not merely technical, but rather involve a blatant disregard for the obligation to stay on the base and report. The violations involved three distinct sets of conditions imposed on three occasions, twice by custody review officers and once by a military judge. This is a case of significant gravity. Dismissal alone, imposed on a member who was already dissociated from what can be considered a normal military career while awaiting an administrative release would not, in my view, be sufficient to meet the overarching needs of maintenance of discipline.

[33] In making this finding, I am entirely cognizant of the fact that the mental health of the offender played a role in the commission of the offences and continues to play a role in his prospects for rehabilitation. For that reason, I find that the duration of imprisonment proposed by the prosecution is excessive and unnecessary to meet the requirements of discipline. Considering that the offender has spent 191 hours over 12 days in pre-trial custody, I believe that a punishment of 15 days of imprisonment, combined with the punishment of dismissal, would be the minimum sentence meeting the requirements of discipline in the circumstances of this case. The impact of imposing

imprisonment would serve the objectives of denunciation and deterrence regardless of the duration of the period of imprisonment.

The suspension of the punishment of imprisonment

[34] The defence submitted that any punishment of imprisonment that I may find is required should be suspended. Section 215 of the *NDA* provides that:

> Where an offender has been sentenced to imprisonment or detention, the carrying into effect of the punishment may be suspended by the service tribunal that imposed the punishment.

[35] It is clear from this provision that the issue of suspension of a sentence of incarceration does not arise unless and until the sentencing judge has determined that the offender is to be sentenced to imprisonment or detention, after having applied the proper sentencing principles appropriate in the circumstances of the offence and the offender.

[36] How should military judges determine whether a sentence should be suspended? In the absence of legislated criteria for suspension, military judges sentencing offenders at courts martial have developed over time two requirements which must be met. This is illustrated in my decision of this year in *R. v. Boire*, 2015 CM 4010, in which I applied two decisions of Military Judge d'Auteuil in *R. v. Paradis*, 2010 CM 3025 and *R. v. Masserey*, 2012 CM 3004.

[37] To obtain the suspension of a sentence of imprisonment or detention, the offender must demonstrate, on a balance of probabilities, that his or her particular circumstances justify a suspension of the punishment of imprisonment or detention. If the offender has met this burden, the court must consider whether a suspension of the punishment of imprisonment or detention would undermine the public trust in the military justice system, in the circumstances of the offences and the offender including, but not limited to, the particular circumstances justifying a suspension.

Should the punishment of imprisonment be suspended?

[38] In this case, Second Lieutenant Caicedo submits that his current medical condition, which is related to the commission of the offences, would justify suspending the sentence of imprisonment. In support of this submission, defence counsel referred to the expert opinion of Dr Labonté, who, in her report, found that the imposition of a strict routine to the offender, typical of incarceration, is likely to increase his stress level and may be counterproductive.

[39] I note that Dr Labonté is not stating that Second Lieutenant Caicedo cannot be sentenced to imprisonment; her opinion on that issue is oriented towards comparing a service prison to a civilian correctional centre. I take it though that the increased stress that would invariably accompany being sent to prison is not going to do any good to the rehabilitation of the offender and to the heavy challenges he is likely to face in adapting

to civilian life. Taking into consideration the short duration of imprisonment for 15 days that I consider the necessary minimum to meet the needs of discipline, I am of the view that, in the circumstances, the offender has justified a suspension of that specific sentence of imprisonment. This is consistent with the finding made by the Chief Military Judge in *R. v. O'Toole*, 2012 CM 1018.

[40] Turning now to the second requirement, I must consider whether a suspension of the punishment of imprisonment would undermine the public trust in the military justice system, in the circumstances of the offences and the offender, including the particular circumstances justifying a suspension. I find that the mental health circumstances of Second Lieutenant Caicedo, justifying the suspension of the punishment of imprisonment in this case, are of such a nature to be readily understood as compelling for a reasonably informed observer. That is especially the case when the same mental health condition had such an impact on the commission of the offences.

[41] Consequently, the carrying into effect of the punishment of imprisonment will be suspended.

The military versus civilian prison debate

[42] Although these reasons are obviously sufficient to dispose of the sentencing issue in this case, the court feels it needs to state its views on a debate which consumed several hours of this sentencing hearing over whether the offender should be serving an eventual sentence of imprisonment at the Canadian Forces Service Prison and Detention Barracks in Edmonton or at a civilian institution. Defence counsel requested that his client be sent to a civilian institution. The prosecution submitted that I should commit the offender to the Canadian Forces Service Prison and Detention Barracks.

[43] The law applicable to this issue is found at section 220(3) of the *NDA*, reproduced and amplified in QR&O 114.06, which reads as follows.

> 114.06 – COMMITTAL TO CIVIL PRISONS
>
> (1) Subsection 220(3) of the *National Defence Act* provides:
>
> > "220. (3) A service prisoner whose punishment of imprisonment for less than two years is to be put into execution shall as soon as practicable be committed to a civil prison to undergo punishment according to law, except that a committing authority may, in accordance with regulations made by the Governor in Council, order that a service prisoner be committed to a service prison or detention barrack to undergo the punishment or part thereof."
>
> (2) Subject to paragraph (3), where the exigencies of the service make it desirable to do so, a committing authority may order that a service prisoner be committed to a service prison or detention barrack, there to undergo the punishment, or such part of the punishment as the committing authority may order.
>
> (3) Where an offender who is subject to the Code of Service Discipline under subsection 61(1) of the *National Defence Act* is sentenced outside of Canada to undergo

> imprisonment for less than two years, the committing authority may, on the authority of the Chief of the Defence Staff, order that the offender be committed to a service prison or detention barrack, there to undergo all or such part of the punishment, as the Chief of the Defence Staff may order.

[44] As a military judge I am a committing authority. If I am going to impose a punishment of imprisonment for less than two years, as was foreseen in this case, the law obliges me, in putting the sentence into execution, to commit the person as soon as practicable to a civilian prison. "As soon as practicable" means upon signing a committal order on the bench as my decision is rendered. That is the rule. The rest of section 220(3) is the exception, as clearly indicated by the use of the word "except" before the description of the circumstances when I can order that a service prisoner be committed to a service prison or detention barrack. In Canada, these circumstances are limited to where the exigencies of the service make it desirable to do so.

[45] I am certainly prepared to assume that should a given offender request to be sent to a service prison to serve his or her punishment and the prosecution consents, the criteria of exigencies of the service were properly considered and can be assumed by the military judge as being met. That is not the case when the defence objects. In such a situation, it is up to the prosecution to establish those exigencies of the service, on a balance of probabilities.

[46] In these proceedings, the affidavit and testimony of the Commandant of the Canadian Forces Service Prison and Detention Barracks was to the effect that the Edmonton Service Prison was an excellent facility free of drugs and violence and is committed to the rehabilitation of offenders. Even if I was impressed with the testimony of the commandant and her commitment to help those persons imprisoned or detained in her facility, it remains that this evidence did not go to the applicable criteria of the exigencies of the service. The evidence was plainly irrelevant and, combined with the request for a sentence of dismissal from Her Majesty's service requested by prosecution, was internally incoherent. What would be the exigencies of the service in having a person sentenced to dismissal, hence to be dissociated from the Canadian Armed Forces, serve a sentence in a service prison?

[47] It seems to me that authorities, prosecutorial or otherwise, would be better spending their energy, time, arguments and evidence as to the excellence of the Edmonton facility to convince Parliament to change the *NDA* to provide for the use of that facility as the primary place of imprisonment. Alternatively, they could spend some energy to show members of the military community who may face the prospect of imprisonment that they may request to serve that punishment in Edmonton instead of in a civilian facility.

[48] I hope that I will not again have to live through such a useless debate in my courtroom in the future. Judicial resources must be used more wisely.

Imposition of sentence

[49] Second Lieutenant Caicedo, the circumstances of the twelve charges I found you guilty of reveal a behaviour that is entirely incompatible with service in the Canadian Armed Forces. You have had challenges throughout your career, which seem to have a link with a mental health condition which will affect you for the rest of your life. This condition was a significant factor in my decision not to have you actually serve any time in prison despite the gravity of your offences. You have enormous challenges ahead of you and I decided not to make your situation more challenging. I believe you deserve a break. I hope you will learn from these proceedings and that you will be able to move on with your life outside of the Canadian Armed Forces without reoffending.

FOR THESE REASONS, THE COURT:

[50] **SENTENCES** you to imprisonment for a period of 15 days and dismissal from Her Majesty's service.

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

Counsel:

The Director of Military Prosecutions, as represented by Major J.S.P. Doucet and Major A.J. Van Der Linde

Lieutenant-Commander P.D. Desbiens, Defence Counsel Services, Counsel for Second Lieutenant C.W. Caicedo