COURT MARTIAL

Citation: *R v Gagnon,* 2015 CM 4013

Date: 20150722
Docket: 201503

Standing Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Bombardier J.M.L. Gagnon, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Bombardier Gagnon, having accepted and recorded your plea of guilty in respect of the four charges on the charge sheet, the court now finds you guilty of the three charges under section 85 of the *National Defence Act* (*NDA*) for having used insulting language to a superior officer and the one charge under section 83 of the *National Defence Act* for having disobeyed a lawful command of a superior officer

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. As well, I have considered the facts relevant to this case as disclosed in the statement of circumstances and the material submitted during the course of the sentencing hearing. I

have also considered the submissions of counsel, both for the prosecution and for the defence.

Purpose of the military justice system

[3] The military justice system constitutes the ultimate means to enforce discipline in the Canadian 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 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 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.

Principles applicable to sentences

[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, 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) require that the judge imposing a sentence at a court martial considers 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.

The offender

[8] There has been no evidence presented by the defence on the past performance of Bombardier Gagnon on how he has dealt with the pending charges in the last fifteen months or on his prospects for the future. From the Member's Personnel Record Résumé at Exhibit 8, tendered by the prosecution in application of QR&O 112.51(3) the Court can see that the offender is thirty-one years old. He has served continuously in the Regular Force as an artilleryman since July 2003. Following basic and occupational training, he has been posted to Petawawa. He deployed for a brief period in Sri Lanka and has served in Afghanistan on two occasions: for one month in 2007, and then for ten months in 2010-2011. He is single and has a five-year-old daughter.

[9] Both the statement of circumstances at Exhibit 7 and the agreed statement of fact at Exhibit 8 provide some background on the future perspectives of Bombardier Gagnon as a member of the Canadian Armed Forces (CAF). Essentially, Bombardier Gagnon has been on Medical Employment Limitations since 21 October 2013 and has made attempts to be released from the CAF medically since about that time. The unit to which he belongs, the 2nd Regiment Royal Canadian Horse Artillery (2 RCHA), has assessed that he should be released from the CAF on grounds of unsatisfactory conduct. This disagreement was at the source of the confrontation of 1 April 2014, when the offences were committed.

[10] To this day, Bombardier Gagnon remains on medical employment limitations that restrict him to working one half day per week. His suitability for continuing employment in the military is currently being assessed by the Director of Medical Policy, as well as the recommendations for his release for unsatisfactory conduct and/or misconduct. It is likely that Bombardier Gagnon will be released from the CAF in the near future but it remains unknown under what item to the table to QR&O article 15.01 the release will be effected.

The offences

[11] In arriving at evaluating what would be a fair and appropriate sentence, the court has considered the objective seriousness of the offences as illustrated by the maximum punishment that the Court could impose. Offences under section 85 of the *NDA* are punishable by dismissal with disgrace from Her Majesty's Service. Offences of disobedience of a lawful command under section 83 of the *NDA* are objectively more severe as they are punishable by imprisonment for life. It is one of the most severe offences provided by the Code of Service Discipline.

[12] The circumstances of the offence in this case are as follows:

(a) The events relating to all of the charges occurred on 1 April 2014, in the context of a meeting to which Bombardier Gagnon was summoned in his Commanding Officer's office to receive notification of the documentation related to the intent of his superiors to recommend his release from the CAF under Item 5(f) in the table to article 15.01 of the QR&O as a result of unsatisfactory conduct. Bombardier Gagnon was marched into the office before his Commanding Officer (CO), the late Lieutenant-Colonel D.R. Bobbitt, in the presence of the Unit's Regimental Sergeant Major (RSM), Chief Warrant Officer Hoegi and two other superior officers.

(b) After Bombardier Gagnon was placed at "stand easy", Lieutenant-Colonel Bobbit explained the process surrounding the Notice of Intent to recommend his release. Bombardier Gagnon told Lieutenant-Colonel Bobbit that he had been trying to get out of the CAF under a medical release for some time and asked about his request for a posting to the Joint Personnel Support Unit. Lieutenant-Colonel Bobbitt replied that he did not support the request given continuing poor conduct and ongoing disciplinary and administrative actions. Lieutenant-Colonel Bobbitt told Bombardier Gagnon that he felt he needed the structure and discipline of belonging to a unit in order to address his conduct issues.

(c) Bombardier Gagnon then said, "Fuck this" or words to that effect, to Lieutenant-Colonel Bobbitt and turned to leave the office. Chief Warrant Officer Hoegi then ordered Bombardier Gagnon to return to his position in front of Lieutenant-Colonel Bobbitt's desk and stepped in front of the door. Bombardier Gagnon attempted to move Chief Warrant Officer Hoegi out of the way and a scuffle ensued. Chief Warrant Officer Hoegi told everyone to stop and Bombardier Gagnon left the CO's office.

(d) After leaving the CO's office, and in the course of arguing with Chief Warrant Officer Hoegi, Bombardier Gagnon said to Chief Warrant Officer Hoegi "Fuck you, RSM" or words to that effect. It appears that a number of personnel from the unit were in the area when the argument

was taking place outside of the CO's office. A short time later Bombardier Gagnon returned to the CO's office and said to Lieutenant-Colonel Bobbitt, "I'll sign the fucking paperwork" or words to that effect.

(e) Following the incident, Bombardier Gagnon was briefed by his CO on available assistance to deal with emotional and mental issues, he was medically assessed and his chain of command ensured that he was under direct supervision for the remainder of the day, for his own good.

[13] The circumstances of the offences demonstrate to the court one incident where Bombardier Gagnon, being formally dealt with by his chain of command in relation to an important administrative matter pertaining to the immediate conditions of his service and the terms of his release from the CAF, became upset, refused to obey an order and became verbally abusive to his CO and the Regimental Sergeant Major of his Regiment, in the presence of other superior officers and within earshot of various members of his unit.

[14] Offences such as these involving sections 83 and 85 of the *NDA* are aimed to protect and preserve the core values of military discipline. Discipline is that quality that every member of the military must have that allows him or her to put the interests of Canada and of the service before personal interests. This is necessary because members of the CAF 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 through instruction, training and practice, it is something that must be internalized, as one of the fundamental prerequisites to operational effectiveness in any armed force.

Aggravating factors

[15] The prosecution submitted that in addition to the context of the serious disciplinary offences committed in this case, the court should take into consideration the conduct sheet of the offender, the fact that his unit was at high readiness when the offences were committed and the effect the incident had on the confidence of members in the disciplinary process as aggravating factors in this case. I will address these issues in turn.

[16] First, the conduct sheet of the offender. Produced at Exhibit 6, it shows one conviction on 13 August 2014 for an offence under section 85 of the *NDA* committed on 27 March 2014, revealing a behavior similar to what the offender engaged into in this case. However, as he had not yet benefitted from his conviction at the time of committing the offences to which he pleaded guilty today, that conviction cannot be considered as an aggravating factor for consideration of a proper sentence in this case (see *R. v. Castillo,* 2003 CMAC 6 and C.C. Ruby, *Sentencing*, 8th ed. at pp. 393-394, para. 8.70). Counsel referred to the other convictions on the conduct sheet as dated and

not relevant to the behavior at play here. I agree. Absences without leave in 2005, when the offender was in the rank of gunner and a fight in 2013 cannot be related to this case, although they reveal some difficulties the offender had with respect for orders and discipline.

[17] Secondly, the high readiness status of a unit may be relevant to assess aggravating factors as unit authorities may have much better things to do when on high readiness than dealing with the misconduct of an offender as in this case. Yet, I have to be careful – dealing with people is an essential part of the military activity. That is what key members of the chain of command were in the process of doing when the offences were committed here. There is no evidence that the additional administrative burden caused by the offences generated work of such an extraordinary nature as to jeopardize the readiness of the unit.

[18] Finally and most importantly, I must address the prosecution's submission, based on the testimony of Chief Warrant Officer Hoegi, that the delay in getting this very public matter to its resolution had an effect on the confidence of members in the disciplinary process and that this should be considered as an aggravating factor.

[19] I have no difficulties to find as aggravating in relation to charge three, the fact that the insults directed at Chief Warrant Officer Hoegi could be heard by unit personnel in the vicinity. This aggravates the offence by virtue of the public nature of the insult uttered.

[20] Yet, the accused cannot suffer aggravating consequences from the fact that members of his unit, aware of the offence, may then have become dissatisfied with the time it took for the case to be tried. I certainly echo the concerns apparently voiced by some members of the unit. As my colleague, Military Judge d'Auteuil, said in *R. v. Menard,* 2012 CM 3016 at paragraph 15, "the quicker a serious disciplinary matter is dealt with, the more relevant and effective the punishment is with respect to objectives considered by the court and the effect on the morale and cohesion of the unit's members." Yet, these words were pronounced in relation to a mitigating, not an aggravating factor.

[21] It is not my role to lay blame on anyone for the fifteen months it took to bring this matter to this point or to explain why it is so. However, I trust that the mere fact that there is an offender being sentenced today in this public trial in the presence of several members of 2 RCHA will serve as an indication that that the offender is not getting away from his responsibility, and serve a certain effect in denouncing the behavior and deterring others from engaging in the same kind of conduct. Indeed, in the particular circumstances of this case, the focus of sentencing should be placed on the objectives of denunciation of the offender's conduct and deterrence, not only specific deterrence, to ensure that the conduct of the offender is not repeated, but also general deterrence.

Mitigating factors

[22] The court also considered the following mitigating factors:

(a) First and foremost, the offender's guilty plea which the court considers as a genuine sign of remorse and an indication that the offender is taking full responsibility for what he has done.

(b) The delay in bringing these charges to their conclusion, even without specific evidence of prejudice on the offender. Having matters hang over one's head is bound to have some effect, especially when medical employment limitations are at play.

(c) Bombardier Gagnon's service with the Canadian Forces for over twelve years including deployments, his age and potential to still make a positive contribution to Canadian society in the future, even if he has left the CAF.

The joint submission of counsel and its effect

[23] The prosecutor and defence counsel made a joint submission on the sentence to be imposed by the court. They both recommended that this court impose a sentence comprised of the punishments of a reprimand and a fine of $1,500 in order to meet justice requirements.

[24] Although this court is not bound by this joint recommendation, it has been determined by the CMAC in *R. v Taylor,* 2008 CMAC 1 at paragraph 21 that the sentencing judge at a court martial cannot depart from a joint submission unless there are cogent reasons for doing so. Cogent reasons mean where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest. As a military judge, I may not like the sentence being jointly proposed and I may think that I would have come up with something better. Yet, any such opinion I may have is not sufficient to reverse the joint submission that was made to me.

[25] In the course of the sentencing hearing, the prosecution and defence counsel presented the Court with cases which may be considered as useful precedents to assist in determining the range of punishments which may be relevant to the imposition of a proper sentence in this case. This assistance is most welcome, as the Court has the obligation to determine if the proposed sentence is unfit. Sentences imposed by military tribunals in previous cases are useful to appreciate the kind of punishment that would be appropriate here. That being said, every case is different. For this reason, and in the circumstances, I don't see the need to go over these cases in detail in these reasons. Suffice to say that those cases show that the proposed sentence corresponds to punishments imposed in the past for similar offences. That is sufficient to allow the Court to conclude that the proposed sentence is not unfit.

[26] Considering the nature of the offences, the circumstances in which they were committed, the applicable sentencing principles and the aggravating and mitigating factors mentioned previously, I am of the view that the punishments of a reprimand and a fine of $1,500 jointly proposed by counsel is within the range of appropriate sentences in this case. The joint submission made by counsel is not contrary to the public interest and will not bring the administration of justice into disrepute. The Court will therefore accept it.

[27] In reaching this conclusion, I am aware of the indirect consequence of such a sentence. The conviction of Bombardier Gagnon and the sentence imposed will not only appear on his conduct sheet but also on a criminal record.

[28] Bombardier Gagnon, the circumstances of the charges you pleaded guilty to reveal behaviour that is entirely incompatible with service in the Canadian Armed Forces. You have no doubt accomplished a number of things in the twelve years since you have joined, including deployments overseas. Unfortunately, these accomplishments were tarnished by your behaviour of 1 April 2014 for which I am sentencing you today. You may think that none of this matters anymore, since you are leaving the military and you will soon find yourself in civilian streets. Yet, the values of respect for authority you have failed to abide by are not exclusive to the CAF. I can only hope that you will come to gain some perspective on your service and those you served with and that you will endeavor to move on with your life without re-offending.

FOR THESE REASONS, THE COURT:

[29] **SENTENCES** you to a reprimand and a fine of $1,500 payable at a rate of $300 per month. Should you be released from the CAF before the full payment of the fine, any outstanding sum will be payable at the date of your release.

Counsel:

The Director of Military Prosecutions as represented by Major P. Rawal

Lieutenant-Commander B.G. Walden, Defence Counsel Services, Counsel for Bombardier J.M.L. Gagnon