**COURT MARTIAL**

**Citation:** *R. v. Perry*, 2015 CM 3012

**Date:** 20150903
**Docket**: 201518

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Corporal J.A. Perry, Offender**

**Before:** Lieutenant-Colonel L.-V. d'Auteuil, M.J.

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**REASONS FOR SENTENCE**

(Orally)

**Introduction**

[1] Corporal Perry, the court having accepted and recorded a plea of guilty in respect of the first and only charge on the charge sheet, this court now finds you guilty of this charge.

[2] In the particular context of the Canadian Armed Forces, the military justice system constitutes the ultimate means of enforcing discipline, which is a fundamental element of the military activity in the Canadian Forces. The purpose of this system is to prevent misconduct or in a more positive way promote good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusting and reliable manner, successful missions. The military justice system also ensures that public order is maintained and that those subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[3] Here in this case, the prosecutor and the offender's defence counsel made a joint submission on sentence to be imposed by the court. They recommended that this court sentence you to detention for a period of 25 days. Although this court is not bound by this joint recommendation, it is generally accepted that the sentencing judge should depart from the joint submission only when 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 mentioned in the Court Martial Appeal Court decision of *R. v. Taylor*, 2008 CMAC 1 at paragraph 21.

[4] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and the maintenance of discipline and, from a more general perspective, the maintenance of a just, peaceful and safe society. However, the law does not allow a military judge to impose a sentence that would be beyond what is required in the circumstances of the case. In other words, any sentence imposed by a judge must be adapted to the individual offender and constitute the minimum necessary intervention since moderation is the bedrock principle of the modern theory of sentencing in Canada.

[5] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of discipline, as I already mentioned, 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 offence or offences;

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

(e) to rehabilitate and reform offenders.

[6] When imposing sentence, a military court must also take into consideration the following principles:

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

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

(c) the 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 in the

circumstances; in short, the court should impose a sentence of imprisonment or detention only as a last resort as it was established by the Court Martial Appeal Court and the Supreme Court of Canada decisions; and

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

[7] I came to the conclusion that in the particular circumstances of this case, sentencing should place the focus on the objectives of denunciation and general deterrence.

[8] The circumstances of this case are as follows:

(a) On the evening of 9 December 2013, following the 2 CER (Combat Engineer Regiment) Christmas Dinner, both Corporal Perry and Corporal Harwood attended the 2 CER accommodations building (P101) on Canadian Forces Base Petawawa. They had both consumed alcohol.

(b) Sometime during the evening, a fight between other unidentified individuals occurred on the first floor. Both Corporal Perry and Corporal Harwood somehow became involved in this incident. However, while Corporal Perry and Corporal Harwood had physical contact with each other, the exact nature of their respective actions, as part of this event, remains unclear. They each contend that they were attempting to break up the fight.

(c) After all parties involved in the altercation were separated, Corporal Harwood went up to the second floor. Sometime after that, Corporal Perry walked up to Corporal Harwood and delivered a direct punch to Corporal Harwood's face. As a result of the punch, Corporal Harwood was knocked to the floor and struck his head. Corporal Perry immediately left the scene.

(d) Corporal Anderson and Corporal Ross, who were present, provided first aid and called 911. An ambulance was dispatched and Corporal Harwood was evacuated to the Pembroke Hospital.

(e) Corporal Harwood sustained injuries directly resulting from the punch he received to the face which included:

(i) a cut and swelling to the upper lip, which required four stitches; and

(ii) a cut to the back of the head, two centimetres in length.

(f) Corporal Harwood's injury to his upper lip required a scar revision consisting of surgery, which was performed on 9 March 2015. The scar was reassessed on 20 April 2015 and it has evolved favourably.

(g) Corporal Perry had been informed that the military police were looking for him and he presented himself at the military police detachment on the morning of 10 December 2013, the day after the incident. Corporal Perry was arrested by the military police that same day, in the morning. He was then released by the Custody Review Officer, with conditions. He has been under the following conditions since then up to today:

(i) remain under military authority;

(ii) abstain from communicating with Corporal Harwood;

(iii) keep the peace and be of good behaviour; and

(iv) abstain from the consumption and possession of alcohol.

(h) On 27 October 2014, the Commanding Officer of 2 CER placed Corporal Perry on Counselling and Probation (C&P) for this same incident. Corporal Perry successfully completed the C&P on 27 April 2015.

[9] In arriving at what the court considers a fair and appropriate sentence, the court has considered the following mitigating and aggravating factors.

[10] As a matter of aggravating factors, the court considers:

a. The objective seriousness of the offence. The offence you were charged with was in accordance with section 86 of the *National Defence Act*, which is punishable by imprisonment for less than two years or to less punishment.

b. There is also the subjective seriousness of the offence which would involve four aspects for me:

(i) The clear disrespect you showed by your action for one of your peers. And I think as mentioned by your counsel, that without the consumption of alcohol being involved in this incident such a thing would not have happened. So you have to understand and I think you understand that resolving a matter in such a way clearly does not show any respect for others. And for any military member, no matter their rank and their function, at least it's one of the most important aspects to consider, you have shown disrespect.

(ii) There's the fact that it was a social military event, involving many other military members including many of your peers, that occurred on a defence establishment. Part of leadership is the fact to be able to have self-control of your actions and to be an example no matter what is the rank. And you're an experienced corporal today and also at the time of the incident, so you knew what you were doing was not a good example to give to others in many ways and I have to consider that.

(iii) There's, I would say, some kind of premeditation disclosed by the facts of this case, in the sense that a first fight occurred not involving you. You were put in a situation where there's some kind of violence used, not involving yourself and then things calmed down and you got back to the place and then, without any notice, punched somebody else. It disclosed that you, in one way or another, gave thought to your next action, so it's not just on the spur of the moment that this thing happened. There were some things that happened before that gave you some time to think about what you were doing.

(iv) One of the most serious aggravating factors, as put by the prosecutor, is the level of violence involved and used in the incident, reflected by the consequences on Corporal Harwood, the victim in this case. It is just one punch, but what a punch! You knocked him out, clearly and he lost consciousness for a moment and he hit his head. It could have been more serious than what he got. I clearly understand your intent was not to hurt him or to injure him in that way, but you have to remember that acting in such a way may lead to other unwilling consequences on your part and it was violent, so it's an aggravating factor that I have to consider.

[11] There are some mitigating factors that I have to think about:

(a) Clearly, there's your guilty plea. As I mentioned earlier, it is your first opportunity to tell the court of your position. And what you said to me through your guilty plea, is the fact that you're taking full responsibility for what you did and it goes under the mitigating factor that I have to consider.

(b) There's also your cooperation. You showed up at the police when you heard that they were looking for you. So you didn't hide, you didn't escape, you didn't try to go somewhere else, you faced the consequences. It has to go under that item, too.

(c) There's also the Counselling and Probation for this incident. It is an administrative action and it's not a sentence for what you did, but for me it is a mean to deter people and pass a message. That's a way for a commanding officer to say, this person is under some kind of probation in order to make sure that this person will correct his own behaviour. This is what you did and a message has been passed to everybody that such behaviour won't be tolerated by your commanding officer. And clearly he told people that for such an offence there's some administrative consequences that may deter some people, and I have to consider that.

(d) I have to consider the fact that you respected your conditions when you were released from arrest. So it's a year and a half, about eighteen months that you have respected all the conditions. And I have to keep this in mind, too. It reflects that you're taking responsibility and you wanted to show that you can maintain good behaviour in the circumstances.

(e) Without having heard from you or getting any evidence regarding your performance in the military context, my understanding from the fact that you respected the conditions and you successfully went through the Counselling and Probation process demonstrates that it's probably something out of character for you to do so. And adding to the fact, as mentioned by your counsel, that there was consumption of alcohol involved, clearly it's not something that you are used to doing in order to resolve matters, and I also consider that.

[12] Now regarding the suggested sentence, it is suggested by your counsel and the prosecutor to impose a sentence of detention. It is incarceration and incarceration is imposed as a means of last resort only. There's nothing lower than that that could be considered by the court as a fit sentence. And you heard me having some problems with the suggestion regarding the context of the offence and what has happened so far in the last 18 months. Even though it does appear to me as a bit harsh, I do not see anything unreasonable in this suggestion made by both counsel in the context of a plea bargaining as presented by your counsel. I do understand that your plea and the suggestion is a clear result from discussions that occur among counsels and from the facts of this case when looking at the offence for which you have pleaded guilty, it would appear to me that this sentence is very high in the scale of punishment for this type of offence. However, considering the context, considering also that you are represented by an experienced counsel, and that the prosecution pays attention to the circumstances of the offence, and it ended up with this type of offence put before the court, I do not see any cogent reason to set aside this suggestion.

[13] What I want to put on the record and clearly state is that if I accept the suggestion made by counsels, it is not an indication that such offence deserve every time incarceration. Each case is different. Passing a sentence as specified by the Supreme Court of Canada in some decisions is an individualized process. I do understand and

respect what it is suggested to me and I understand the context of the suggestion, and because of that, I do not see incarceration as being an unfit sentence in the circumstances.

[14] It has been suggested to me, as a matter of type of incarceration, to sentence you to detention. Detention seeks to rehabilitate service detainees and re-instil in them the habit of obedience in a military framework organized around the values and skills unique to members of the Canadian Forces. Respect is one of those values and detention. For me, it would achieve that purpose.

[15] The number of days suggested was also a concern to me, but when I pay attention to the context of those discussions and what has been put by counsel to me, I do find that it is still reasonable in the circumstances because the maximum, as a matter of detention, that can be imposed is 90 days, so 25 is reasonable.

[16] It has not been suggested to me to suspend the sentence, so I won't consider that and there's no circumstances presented to me that would suggest that it would be a good thing to do; I don't have that evidence.

[17] So I will accept the joint submission made by counsel to sentence you to detention for 25 days, considering that it is not contrary to the public interest and will not bring the administration of justice into disrepute.

[18] What I do understand too, Corporal Perry, is that you learned a lesson from that incident and that sentence would be used by you to turn the page. You will have another 25 days to think about what happened, while you are there, but also, some time to think about what you want to become in the Canadian Forces. There are always ways to turn an experience into something positive. I don't know your background, but maybe you want to become a leader in the Canadian Forces. I think it's a hard way to learn it, but it can be used as an experience. You don't want to have other people, other soldiers, to do such a thing. And there are ways to avoid that; self-control is one, as is anger management. Getting into a fight in order to settle things is not the way, and that's why the Code of Service Discipline has created an offence for such a thing.

**FOR THESE REASONS, THE COURT:**

[19] **FINDS** Corporal Perry guilty of the first and only charge on the charge sheet for having fought with a person subject to the Code of Service Discipline contrary to section 86 of the *National Defence Act*;

[20] **SENTENCES** Corporal Perry to detention for 25 days.

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**Counsel:**

The Director of Military Prosecutions as represented by Commander P. Killaby

Lieutenant-Commander B. Walden, Defence Counsel Services, Counsel for Corporal Perry