



COURT MARTIAL

Citation: *R. v. MacKenzie*, 2015 CM 4021

Date: 20151204

Docket: 201551

Standing Court Martial

Canadian Forces Base Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal S.D. MacKenzie, Offender

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

REASONS FOR SENTENCE

(Orally)

Declaration of guilt

[1] Master Corporal MacKenzie, having accepted and recorded your plea of guilty in respect of charge two on the charge sheet, the court now finds you guilty of that charge under section 97 of the *National Defence Act (NDA)* for drunkenness. I have also acceded to a request made by your counsel under subsection 194(1) of the *NDA* to take into consideration for the purposes of the sentence another offence of drunkenness as if you had been charged with, tried for and found guilty of that offence.

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 as disclosed in the statement of circumstances, the joint statement of facts and the material submitted during the course of the sentencing hearing. I have also considered the testimony of witnesses and 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 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.

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 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.

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, 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) require 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, therefore, be adapted to the individual offender and the offence he or she committed.

The offender

[8] Master Corporal MacKenzie is a 43-year-old aviation technician with 423 Maritime Helicopter Squadron (423 (MH) Sqn) in Shearwater. He first joined the Canadian Armed Forces as an infantryman with the 3rd Battalion The Royal Canadian Regiment (3 RCR) in 1996. He served in the infantry until 2003, deploying twice in Bosnia. He rejoined in December 2004 as aviation technician. After initial training in Borden, he served mainly in Shearwater with 423 (MH) Sqn and 12 Air Maintenance Squadron (12 AMS), deploying with ships from time to time. His performance in the service of his country has been exemplary throughout both of his careers. Evaluations and course reports submitted as Exhibit 11 reveal that he is a proficient technician, thoroughly dedicated to the Canadian Armed Forces. He has contributed significantly to the success of the units where he has been employed. He is married and has two children.

[9] Master Corporal MacKenzie has had problems with alcohol which manifested in May 2014, when he was arrested and ultimately fined for operation of a motor vehicle while impaired. He was placed on a recorded warning and completed the monitoring period on 29 November 2014. Following the incident subject of charge two and another incident of drunkenness he admitted to in May 2015, he acknowledged that he had an addiction problem which needed to be treated. He was repatriated from deployment in May 2015. Since then, he has successfully completed phases 1 and 2 of treatment and he is on a path of abstinence since 1 October 2015. Two superiors of Master Corporal MacKenzie testified in mitigation. Master Warrant Officer Scott stated that he has observed the work of Master Corporal MacKenzie on numerous occasions, including on HMCS *Fredericton* at the time of the offences and that he is an extremely reliable technician who he would want on his team anytime. Captain Mongeon, a pilot with 423 (MH) Sqn, who was also deployed on HMCS *Fredericton* at the time of the offences, stated that even knowing of the alcohol-related charges against Master Corporal MacKenzie, he would have no hesitation to fly in an aircraft serviced by him as he is very competent and a model for other technicians in the squadron. Incidentally, in his

latest Personnel Evaluation Report for fiscal year 2014/2015, Master Corporal MacKenzie's potential was assessed as mainly outstanding and his commanding officer supported a recommendation for immediate promotion to the rank of sergeant.

The offences

[10] Turning now to the offences. In arriving at evaluating what would be a fair and appropriate sentence, the court has considered the objective seriousness of the two offences for drunkenness which have been committed here, as illustrated by the maximum punishment the court may impose, namely imprisonment for less than two years or less punishment.

[11] The offence at section 97 of the *NDA* sanctions specifically one type of behavior: drinking of alcohol or taking drugs to the point of misbehaving or being unfit for duty. It is a breach of discipline, 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. Discipline is developed and encouraged through instruction, training and practice, but it must also be internalized in the form of self-discipline. This includes the self-discipline required to obey orders and display an exemplary conduct, both on and off duty.

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

- (a) The events relating to the charge occurred on 12 April 2015, on-board HMCS *Fredericton* at anchor off Greenock, Scotland. The ship was then at twelve hours' notice to sail. The crew was allowed shore leave, which expired with the last water taxi proceeding back to the ship at approximately 2330 hours.
- (b) While waiting for the last water taxi, Master Corporal MacKenzie went to a local pub and consumed two alcoholic beverages. Later in the evening, once on-board, he proceeded to the air mechanic workshop and spent time with other members of the ship's company, some from the air detachment and others from other departments. Master Corporal MacKenzie consumed more alcohol while he was there. Shortly after 0100 hours, on 12 April 2015, music was being played loud enough in the air mechanic workshop to wake up the coxswain, who proceeded to the air mechanic workshop, along with three other senior non-commissioned officers (NCO).
- (c) They noticed a smell of alcohol upon entry in the air mechanic workshop, where approximately 12 airmen and sailors were gathered together. A search of the space revealed several opened cans and bottles of alcohol. Following the search, interviews to assess fitness for duty were conducted in the coxswain's office with the members, including Master Corporal MacKenzie.

- (d) On the way down to the coxswain's office, Master Corporal MacKenzie was staggering slightly. During the interview, it was further noted that his speech was slurred and that he had difficulty recalling who he had spent the day with and what he had been doing. He was unsteady on his feet and a smell of alcohol was present. Based on these observations, the senior NCOs present came to the conclusion that Master Corporal MacKenzie was drunk.
- (e) At the time he was interviewed in the coxswain's office, at approximately 0215 hours on 12 April 2015, Master Corporal MacKenzie was, owing to the influence of alcohol, unfit to be entrusted with any of the duties he may have been called upon in case of an emergency, such as responding to a fire or flood, assisting with rescue stations, reacting to an elevation in force protection level or security alert or assist with flying stations.
- (f) The circumstances of the similar offence admitted to, under subsection 194(1) of the *NDA*, occurred on the night of 15 and 16 May 2015, when HMCS *Fredericton* was alongside in Wilhelmshaven, Germany. Master Corporal MacKenzie, after spending part of the evening ashore, returned to HMCS *Fredericton* and went to bed. As other members of the ship's company subsequently returned from shore in an intoxicated state, Master Corporal MacKenzie and others were awoken on the direction of the coxswain, as information obtained led to a belief that they might also be intoxicated.
- (g) Master Corporal MacKenzie was directed to the coxswain's office. He was observed slightly staggering and being unsteady. Once questioned, he had difficulty speaking and had a pervasive smell of alcohol. In the opinion of Master Warrant Officer Scott, present during the interview, Master Corporal MacKenzie was intoxicated. In fact, Master Corporal MacKenzie agreed that he was drunk. He subsequently advised that he had consumed between two and six bottles of beer while ashore.
- (h) At the time he was interviewed in the coxswain's office, at approximately 0200 hours on 16 May 2015, Master Corporal MacKenzie was, owing to the influence of alcohol, unfit to be entrusted with general emergency duties. Shortly after this incident, Master Corporal MacKenzie acknowledged that he had an alcohol problem and was repatriated to Canada where he undertook treatment.
- (i) Throughout the period of April and May 2015, Master Corporal MacKenzie was employed within the air detachment of HMCS *Fredericton*, deployed on Operation (OP) REASSURANCE. The alcohol policy during that deployment was stated in a Task Force Standing Order

(TFSO), which prohibited any alcohol from being consumed while at sea or at anchor. It further allowed for a maximum of two drinks, per person, per 24 hour period while alongside. Master Corporal MacKenzie acknowledged knowing and understanding that TFSO.

Mitigating factors

[13] As far as the offender is concerned, the court has 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, in the public forum of this court martial. The plea also avoided the necessity to conduct a trial.
- (b) The fact that Master Corporal MacKenzie has obvious potential to continue to make a positive contribution to the Canadian Armed Forces and indeed Canadian society.
- (c) The efforts Master Corporal MacKenzie have made to gain control of his alcohol dependency, with the support of his chain of command.
- (d) Finally, Master Corporal MacKenzie's service with the Canadian Armed Forces. Not only quantitatively, serving for approximately 18 years, including deployments overseas, but also and especially qualitatively, given his outstanding performance, both before and since the commission of the offences.

Aggravating factors

[14] The conduct of Master Corporal MacKenzie on 12 April and 16 May 2015 was a clear departure from the standard of conduct expected of him. The circumstances of the offences demonstrate to the court that Master Corporal MacKenzie knowingly disregarded an order that was well known and simple to abide by. This was a repeat alcohol-related offence.

[15] Orders prohibiting consumption of alcohol in theatres of operations are enacted by the chain of command for important reasons of operational effectiveness. In committing these offences during OP REASSURANCE, Master Corporal MacKenzie failed to recognize that authorities at the highest levels of the chain of command considered that the special nature of his deployment with HMCS *Fredericton* required a restrictive alcohol policy which, in turn, required a higher standard of conduct of every member of the crew, on-board or ashore. This is aggravating. Indeed, on operations, the impact and potential consequences of misbehavior are greater than on day-to-day duties at one's home unit in Canada. This is especially true on warships.

[16] Master Corporal MacKenzie was aware that drinking was prohibited and would not be tolerated. The decision he made to drink nevertheless constitutes an affront to the authority of the chain of command and to his shipmates who do respect orders. The fact that he did so on-board ship in the air mechanic workshop is aggravating, as he and others could be seen and heard, giving an extremely bad example. These circumstances, combined with the rank and position of responsibility of the offender as aircraft technician on-board HMCS *Fredericton*, are aggravating. He should have known better and showed a better example. Chief Petty Officer 1st Class Conlon explained to the court the importance of having a crew fit for duty on-board, at all times. Even if witnesses expressed support for Master Corporal MacKenzie in their testimony before me, it remains that, in general, a blatant violation of an important order may erode the confidence that superiors need to have in the judgement and skills of someone in the position of the offender.

Objectives of sentencing to be emphasized in this case

[17] These circumstances require that, in sentencing the offender in this case, the court place the focus on the objectives of denunciation, deterrence and rehabilitation.

The joint submission of counsel and its effect

[18] The prosecutor and defence counsel made a joint submission on the sentence to be imposed by the court. They both recommended that I impose a sentence comprised of punishments of a reprimand and a fine of \$2,000 in order to meet justice requirements.

[19] Although this court is not bound by this joint submission, it has been determined by the Court Martial Appeal Court in *R. v. Taylor*, 2008 CMAAC 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 when the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.

[20] In the course of the sentencing hearing, the prosecution and defence counsels presented the court with legal precedents which I considered useful to appreciate the range of punishment imposed by military tribunals in previous circumstances, allowing me to evaluate not only what a proper sentence might be, but also to assist in my obligation to determine if the proposed sentence is unfit. I note that in relation to the incident subject of charge two, a court martial imposed a reprimand and a fine of \$1,500.00 to a corporal, and at summary trial, a reprimand and a fine of \$2,760.76 to a petty officer 2nd class. The suggested sentence, therefore, in my view, respects the principle of parity.

[21] Based on the submissions of both counsels, I am confident that the sentence being suggested here is aimed at properly sanctioning the conduct of the offender. The reprimand, combined with a fine, which has a personal impact, can meet the objectives

of denunciation and general deterrence. The fact that the sentence is imposed in a public trial in the presence of several members of the military community indicates that the offender is not escaping his responsibilities in relation to his conduct. It meets the objectives of specific deterrence, along with meeting the objectives of denouncing the behavior and deterring others from engaging in the same kind of conduct.

[22] Considering the nature of the offence, the circumstances in which it was 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 \$2,000, 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.

[23] Master Corporal MacKenzie, I have no doubt that you are an exceptional person who has contributed significantly to the Canadian Armed Forces in the past. You have outstanding potential, in my view, to contribute even more in the future. Yet, the profession of arm that you chose and excel at requires more than outstanding performance, it demands exemplary conduct, on and off duty. The circumstances of the charge you pleaded guilty to and the other that you admitted to reveal instances of unacceptable behaviour, which fortunately appears to be out of character for you. Yet, the demands on you to display exemplary conduct is only going to increase as you will be entrusted with more responsibilities, especially more leadership responsibilities in the rank of sergeant to which you aspire. These proceedings will be over shortly, but the efforts you will have to make to maintain the respect, confidence and support of subordinates, peers and superiors will continue throughout your career, as well as your efforts to abstain from alcohol. I trust you will succeed without reoffending.

FOR THESE REASONS, THE COURT:

[24] **SENTENCES** you to a reprimand and a fine of \$2,000, payable in two instalments of \$1,000, the first to be paid no later than 15 January 2016 and the second to be paid no later than 15 March 2016.

Counsel:

The Director of Military Prosecutions, as represented by Major D.J.G. Martin

Mr D. Bright, BOYNECLARKE LLP, Counsel for Master Corporal S.D. MacKenzie