COURT MARTIAL

Citation: *R. v. Avon*, 2016 CM 4007

Date: 20160516
Docket: 201570

Standing Court Martial

Canadian Forces Base Valcartier
Courcelette, Québec, Canada

Between:

Her Majesty the Queen

- and -

Bombardier D.J.A. Avon, Offender

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

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR SENTENCE

(Orally)

[1] Bombardier Avon, having accepted and recorded your plea of guilty in regard to the first and only charge on the charge sheet, the Court now finds you guilty of the charge under section 129 of the *National Defence Act*, for conduct to the prejudice of good order and discipline.

[2] It is now my duty, as the military judge presiding over this Standing Court Martial, to determine the sentence. In my deliberations, I took into consideration the sentencing principles that apply to criminal courts in Canada as well as to the courts martial. I considered the relevant facts in this case as presented in the statement of circumstances, read by counsel for the prosecution and admitted by the defence, as well as the documents filed at the sentencing hearing. I also took into consideration the addresses made by counsel, as well as for the prosecutor and the defence.

[3] The military justice system is the ultimate means to enforce discipline within the Canadian Armed Forces and is a fundamental element of military life. The goal of this system is to encourage positive behaviour while sanctioning those who commit misconduct. It is through discipline that an armed force is able to ensure that its members accomplish successful missions, in a trusting and reliable manner. Moreover, the military justice system serves the public interest by ensuring respect of the laws by those who are subject to them.

[4] The main goal of a military justice system is to encourage efficiency and morale within the Canadian Armed Forces, which can, occasionally, require tougher punishments to be imposed than to a civilian in the same circumstances. However, the punishment to be imposed by any tribunal, civil or military, must correspond to the minimum required in the circumstances. For a case such as the present case, I must impose the minimum punishment that ensures the maintenance of discipline.

[5] With regard to the sentence, I am guided by the *Queen's Regulations and Orders* (QR&O), under which the punishment must be proportional to the seriousness of the offence and the degree of responsibility of the offender. This involves the consideration of certain principles. Among others, I must encourage parity in sentencing, namely, imposing punishments similar to those imposed on similar offenders having committed similar offences in similar circumstances. I must also take into consideration the indirect impact of the finding of guilty and the sentence and modify the punishment in relation to aggravating or mitigating circumstances related to the offence or the offender.

[6] First, with regard to the offender and his situation, the Court considers that Bombardier Avon is 28 years old. He enrolled in the Regular Force on 17 February 2009, after a few years in the Primary Reserve, le Régiment de Hull. Initially, recruited to the military police, he became a gunner after a mandatory change of occupation in 2011. After successfully completing his basic training in this occupation, he was posted to the 5th Light Artillery Regiment of Canada at the Valcartier Garrison in February 2012 where he still serves today. However, it seems his career is likely to end soon because of job constraints related to his medical condition. He wishes to begin university studies when he is released from the Canadian Armed Forces. The summary of Bombardier Avon's military records indicates he is single and does not have any dependants.

[7] A joint statement of facts was read by counsel for the prosecution and accepted as true by Bombardier Avon. The circumstances of the offences are as follows:

> (a) Between 28 January and 5 February 2014, during a field exercise, Bombardier Avon was with his colleagues near lit naphtha stoves. Wanting to play a bad joke, he threw a capful of naphtha on the pants of Private Martel-Tremblay, a colleague.

(b) Another gunner then set fire to Private Martel-Tremblay's pants with a lighter, without discussing this act previously with Bombardier Avon. The fire was quickly put out and nobody was hurt.

(c) The incident was detrimental to the cohesion and morale within the unit.

(d) Bombardier Avon, aware that his behaviour did not meet the standards of behaviour expected of him, apologized to Private Martel-Tremblay the evening of the incident. He also cooperated with the investigation.

(e) In a joint statement of facts, the Court was informed that Bombardier Avon never intended to harm Private Martel-Tremblay. Moreover, it seems that Bombardier Avon was marginalized within his unit during the disciplinary process that lasted more than 27 months following the offence. This situation caused him significant stress that required a mental health support to obtain the tools to manage this stress and his anxiety in the workplace.

[8] When evaluating what could be considered a fair and appropriate punishment, the Court considered the objective seriousness of the offence, which, under section 129 of the *National Defence Act*, is punishable by dismissal with disgrace from Her Majesty's service or less punishment.

[9] In the circumstances of this case, the Court considered the subjective severity of the offence as aggravating, in that it was committed during an exercise that it was a violation, albeit minor, of the physical integrity of a colleague and, as admitted by the defence, the incident had the effect of undermining cohesion and morale. That being said, as noted by counsel in their addresses, the offence is essentially the result of a very bad joke that would not have had such a significant impact if the subsequent actions of the soldier who set fire to Private Martel-Tremblay's pants had not been performed. Additionally, the Court considered the conduct sheet of Bombardier Avon, which indicates a prior conviction for being absent without leave in 2013. Although the offender cannot be considered a re-offender because this prior conviction was of a different nature than the offence currently before the Court, the absence without leave reflects a lack of personal discipline, the same type of breach the Court is sanctioning today.

[10] The Court also considered the following mitigating factors, as mentioned in counsel's addresses and shown by the evidence submitted during the sentencing hearing:

(a) First, the offender's plea of guilty, which the Court considers an indication of his remorse, and the evidence, as mentioned in the statement of facts, that he accepts responsibility for his actions and collaborated with the authorities.

(b) Despite my previous observations about the subjective seriousness of the offence, it remains that the evidence shows thoughtless behaviour, with no premeditation by Bombardier Avon. He did not act as an aggressor, considering the lack of intent to injure his colleague and the low risk to physical integrity of his actions. I conclude that the address by the prosecution place the offences at a rather low level on the scale of seriousness of offences of conduct to the prejudice of good order and discipline.

(c) The performances and duration of Bombardier Avon's service with the Canadian Armed Forces. There are acknowledgements from the Minister of National Defence in his conduct sheet that indicate that the offender served honourably and contributed to the success of his unit's missions.

(d) The offender's potential, at age 28, he can continue to contribute to the Canadian society in a civilian or military capacity.

[11] The issue of the time between the offence and this trial, and the stress the accused experienced during the long disciplinary process, warrant a few remarks from me, even though both counsel noted that it should be considered as a mitigating factor. It is clear that a criminal or disciplinary investigation, followed by charges being laid and the process by which a person is assigned and then carries the burden of being accused, is stressful. This stress is likely to be even greater when the ongoing criminal or disciplinary process is tightly linked to the environment in which the accused is developing in order to earn a living. This is certainly the case for a, full-time service, member facing charges under the Code of Service Discipline. Every time that person goes to work, he has a burden that could significantly affect his professional or personal ambitions with regard to his service and the people with whom he is required to interact, whether they are superiors, colleagues or subordinates.

[12] That being said, this situation, which is often difficult, does not in itself constitute a factor that should mitigate the punishment. It is a challenge all accused face. To be considered a factor that should reduce the punishment otherwise imposed, there must be evidence of external elements that aggravated the situation. For example, concrete evidence of inappropriate or abusive behaviour by the Canadian Armed Forces, or evidence that the time taken to proceed with the case is excessive in the circumstances, in light of the specific duty to act expeditiously, as found under section 162 of the *National Defence Act*.

[13] In this case, at first glance, it would seem that the delay of more than 27 months, for a case with such minor circumstances to be brought before a court martial, seems very long. Although the Court does not have the elements to determine that this delay was caused by any breach of duty to act expeditiously, it seems that such a long delay, tied to such simple facts, leads the Court to assume that the delay should have been shorter, especially when the prosecution has no explanation to give and openly admits that the deadline in this case is a mitigating factor.

[14] I am aware that the charges were initially laid and then were replaced during a preliminary application a few days from the trial could have caused additional difficulties related to the proof of these offences, especially for a charge initially laid that did not have any apparent tie to the other charge, the facts of which are before the Court today. The Court can understand the practical advantages of writing a charge for an accused for "all his acts". Except it is unlikely that such charges unrelated to each other could be addressed during the same trial, especially if the accused had chosen a General Court Martial. It is often appropriate to proceed as soon as possible with charges sufficiently supported by an investigation. Mechanisms exist if there is a desire and possibility to combine charges later.

[15] That being said, I have come to the conclusion that, under the circumstances of the present case, the sentence should target the objectives of denunciation and deterrence, with the punishment not only dissuading the offender, but also others who, in a similar situation, might consider committing the same type of offence.

[16] The prosecution and the defence presented a joint recommendation to the Court regarding the punishment to be imposed. Counsel recommend, if this Court imposed a sentence consisting of a fine of $200, that the interest of justice would be served. Since the Court has sole discretion in sentencing, it is not bound by such a joint submission, but it cannot dismiss it unless it has serious reasons to do so. As decided by the Court Martial Appeal Court (CMAC) in *R. v. Taylor*, 2008 CMAC 1, at paragraph 21:

> The sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons may include, among others, where the punishment is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.

[17] It seems therefore that the military judge who is given a joint recommendation regarding the punishment to be imposed is severely limited when exercising its sentencing discretion. There are valid reasons for these limits: counsel, particularly for the prosecution, have information about the circumstances of the offence, about the event and decisions affecting the offender after the offences, and on factors related to maintaining discipline, which are not necessarily shared with the Court. The reasons for the delay in bringing this case to trial could have been one of these facts not explained to the Court, but considered in the consideration and discussions that led to the joint recommendation in this present case.

[18] The Court considered the two cases specifically submitted by counsel, namely, *R. v. Laurin*, 2015 CM 4011, and *R. v. Courcy*, 2007 CM 4011. They clearly show that counsel consider that the punishment to be imposed on the offender in the present case should be similar to the sanctions imposed in other cases, involving bad jokes that had a negligible impact on the persons involved. Although in those two cases the military judges were faced with joint recommendations that were simply confirmed, I feel that the punishments in those cases allow me to adequately assess the type of punishment that would be an appropriate sanction for Bombardier Avon's behaviour in the

circumstances of this case. It seems that a sentence comprised of a fine of a minimum amount is within the scope of appropriate punishments.

[19] Considering the nature of the offence, the circumstances in which it was committed, the applicable sentencing principles, and the attenuating and mitigating factors mentioned above, I feel that the sentence jointly recommended by counsel is not unreasonable, or of a nature that would bring the administration of justice into disrepute. I will therefore accept and confirm it.

FOR THESE REASONS, THE COURT:

[20] **FINDS** you guilty of the charge of conduct to the prejudice of good order and discipline as laid under section 129 of the *National Defence Act*.

[21] **SENTENCES** you to a fine in the amount of $200, payable immediately.

Counsel:

The Director of Military Prosecutions, as represented by Major A.J. Van der Linde and Lieutenant(N) A.M. Aubut

Major A. Gélinas-Proulx, Directorate of Defence Counsel Services, counsel for Bombardier D.J.A. Avon